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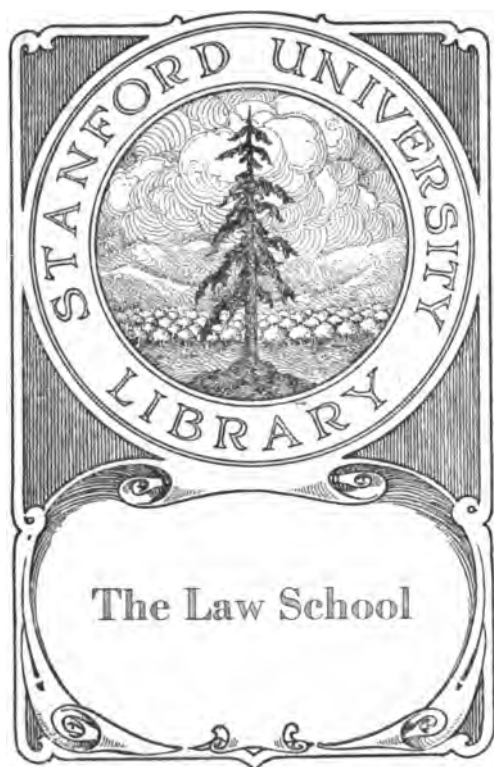
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**AMERICAN**  
**RAILROAD AND CORPORATION**  
**REPORTS.**

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**BEING A COLLECTION OF THE CURRENT DECISIONS OF THE COURTS OF  
LAST RESORT IN THE UNITED STATES PERTAINING TO THE LAW  
OF RAILROADS, PRIVATE AND MUNICIPAL CORPORATIONS, IN-  
CLUDING THE LAW OF INSURANCE, BANKING, CAR-  
RIERS, TELEGRAPH AND TELEPHONE COMPANIES,  
BUILDING AND LOAN ASSOCIATIONS, ETC.**

---

**EDITED AND ANNOTATED BY**

**JOHN LEWIS,**

**AUTHOR OF "A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES."**

**VOLUME V.**

**CHICAGO:**  
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The EDITOR.

CHICAGO, *August*, 1892.





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# AMERICAN RAILROAD AND CORPORATION REPORTS.

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## BANK OF NORTH AMERICA v. RINDGE.

(Supreme Judicial Court of Massachusetts, June 27, 1891.)

1. CORPORATIONS. LIABILITY OF STOCKHOLDERS. ACTIONS IN FOREIGN STATE. Although the laws of Kansas provide that if a judgment creditor of certain corporations is unable to find property whereon to levy execution, he may proceed by action to charge the stockholders with the amount of his judgment, a resident of New York holding an unsatisfied judgment against a Kansas corporation, which has no place of business in Massachusetts, cannot maintain an action in the latter state against a resident of California to establish his personal liability as a stockholder in such corporation, where no proceedings have been taken in Kansas to establish such personal liability.

**A** PPEAL from superior court, Suffolk county. Action by the Bank of North America against Frederick H. Rindge to establish his personal liability as a stockholder in a Kansas corporation.

*Henry S. Dewey* for appellant. *Hutchins & Wheeler* for appellee.

C. ALLEN, J. The plaintiff is a corporation of the state of New York. The defendant is a resident of California, who owned fifty shares of stock in the Haddam State Bank, a corporation of Kansas. The plaintiff recovered judgment in Kansas for \$5,343

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and costs against the Haddam State Bank, and took out execution thereon, but could find no property of the bank whereon to levy, and so the execution was returned unsatisfied. No steps were taken in Kansas to charge the defendant as a stockholder in the bank, but, he being found in Massachusetts, the plaintiff brings this action against him here, seeking to charge him personally for the judgment against the bank to the amount of the par value of his shares therein, namely, \$5,000. This is sought to be done by virtue of the laws of Kansas, respecting which the averment in the declaration is as follows: "And the plaintiff further says that by the laws of the state of Kansas, if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of the stock by him or her owned, together with any amount unpaid thereon; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due by the corporation." The declaration was demurred to, and we have to determine whether the plaintiff states a case upon his declaration. The declaration does not in terms set forth any statute of Kansas nor show to what extent the laws of Kansas above set forth are statutory, or rest merely in judicial decisions. It is to be regretted that we are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that state. But we must take the case as the parties present it to us. The question can hardly be considered as an open one in this commonwealth. This court has often declined to exercise jurisdiction to enforce a liability upon stockholders in corporations established in other states, under statutes of those states. In *Post v. Railroad Co.*, 144 Mass. 341, 345; 11 N. E. Rep'r, 540, it is said: "This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign cor-

poration which involves the relation between it and its stockholders, and in which complete justice can only be done by the courts of the jurisdiction where the corporation was created. See, also, *New Haven Horse-Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 353; 7 N. E. Rep'r, 773, and cases cited.

The case at bar furnishes a strong illustration of the propriety of this course. If the plaintiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California, or in any number of other states where service upon him could be obtained. The plaintiff might also institute similar actions for the same debt in different states against other stockholders. In such case it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others, but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in other states. A dishonest creditor might possibly recover several times over against different stockholders in different states, before they respectively could ascertain the facts. Likewise the defendant, if compelled to pay under a judgment recovered in one state, would find it difficult, if not impossible, to enforce contribution from other stockholders residing elsewhere. Moreover, if the plaintiff might maintain such actions against the defendant, and against other stockholders in different states, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation, which has no property with which to respond to a judgment obtained by such creditor against it in Kansas, may, therefore, without any further proceedings in that state to charge the stockholders, maintain an action against every stockholder in every state of the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some state, it is obvious that a large amount of litigation might ensue,



under which substantial justice, as among the stockholders, could not be worked out. The liability of the stockholder, as set forth in the declaration, is not a general liability for all the debts of the corporation. The execution against the stockholder which can be issued in Kansas in the action against the corporation, as set forth in the declaration, is only "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." Probably, by the true construction of the statute, the action at law to charge stockholders, which is given as an alternative remedy, would be limited to a like amount as the execution; though, according to the averment of the declaration, the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, without any other limitation being expressed. The present plaintiff does not contend that it can recover against the defendant the full amount of its judgment, but only the par value of the defendant's stock in the bank. The liability sought to be enforced is a strictly limited one. It seems to us that a *bona fide*, or, at any rate, a compulsory, payment to one creditor would discharge a stockholder to that extent from liability to others; and a payment of the full par value of his stock would, according to the view which has been expressed by this court, be a full discharge. *Halsey v. McLean*, 12 Allen, 442, though as to this, other courts might hold otherwise. *Fowler v. Robinson*, 31 Me. 189; *Grose v. Hilt*, 36 Me. 22. There is no averment in the declaration that the defendant has not thus been discharged from liability, and perhaps this is not necessary, as it would be more properly a matter of defense. But, in case of several actions in different states, questions of priority of the claims of creditors might arise upon which the decisions of the courts of the different states might not be uniform, and thus the defendant might be held liable more than once, and even a compulsory payment might not avail to protect him, as is shown by the cases cited by the defendant. Moreover, the defendant might, by way of set-off, present claims which he holds either against the corporation in Kansas, or against the creditor who sues him, and different decisions in respect to his right of set-off might be made in different states.

These considerations are suggested to illustrate the practical difficulty of enforcing a liability such as that set forth in the dec-

laration, in other states than that where the corporation is established, in such a way as to secure substantial justice. This difficulty is far greater in cases where no steps have been taken in the state where the corporation is established, to ascertain and determine the amount of each stockholder's liability. There the whole amount of debts can be ascertained, and the proper proportion assessed upon each stockholder ; or his liability can be otherwise determined in a manner which will avoid many of the objections which exist against the maintenance of actions like the present. We remain satisfied with the conclusions heretofore reached by this court, that such an action, under the circumstances which appear here, ought not to be entertained in this state. Limiting our decision to the facts now before us, it is this : that a resident of the state of New York cannot maintain in the courts of this state an action against a resident of the state of California, to establish his personal liability as a stockholder of a corporation organized in the state of Kansas, and having no place of business in this state, for a debt of that corporation to the plaintiff under the laws of Kansas, such as are set forth in the declaration, providing for a certain special and limited liability on the part of stockholders, when no judicial proceedings have been taken in Kansas to ascertain and establish the liability of the defendant as such stockholder. Whether the same result might not be reached, on the ground that the subsidiary liability of stockholders, such as is set forth, is matter of remedy only, and does not follow the stockholder outside the state, there being no averment of a different construction of the statute by the Kansas courts, we need not consider. *Brown v. Slate Co.*, 134 Mass. 590. Judgment for the defendant affirmed.\*

**Stockholders in foreign corporations — enforcing liability of, to creditors.**  
— This question is treated in note to *May v. Black*, 2 Am. R. R. & Corp. Rep. 673. *First National Bank v. Gustin Minerva Min. Co.*, 1 Am. R. R. & Corp. Rep. 272, is also in point.

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\* Reported in 27 N. E. Rep'r, 1015.

## BOYD V. VANDERBILT INS. CO.

(Supreme Court of Tennessee, May 5, 1891.)

1. FIRE INSURANCE. WARRANTY. Where on the face of a fire policy, the property is described as a dwelling-house occupied by tenants, such a statement is a warranty, and becomes a part of the contract, and the assured cannot recover for a loss, unless it is true.

2. WAIVER OF FORFEITURE. There can be no waiver, in the absence of a complete knowledge of all the circumstances; and the fact that the assured, during the life of the policy, notified the company that the premises were vacant, and received a reply that "that was all right," will not amount to an estoppel unless it also appears that the company was made aware that the house was vacant a month before the policy was issued, and had continued so ever since.

3. Where, in addition to a defense growing out of a breach of warranty of occupation, the company claims an over-insurance, the fact that the assured is required to furnish, at some expense to himself, an estimate of his loss, and the value of the house destroyed, in accordance with the terms of the policy, will not amount to a waiver of the breach of warranty.

**A** PPEAL from circuit court, Shelby county, L. H. Estes, judge.

*Malone & Malone* for appellant. *M. B. Trezevant* for appellee.

LUTON, J. Action at law upon a policy of fire insurance. The property insured is described on the face of the policy as a "one-story frame, shingle-roof dwelling-house, occupied by good tenants as such." This policy was issued March 9, 1888, and was for two years. On the 31st of January, 1889, the property was consumed by fire. The insurance company, among other pleas, pleaded that the premises were not occupied, either at time of issuance of policy or at time of loss. There was a judgment for the insurer. Errors are assigned upon the charge of the court to the jury. Among other things, the court charged as follows: "The statement in the policy in this case 'on the one-story frame, shingle-roof dwelling-house, occupied by good tenants as such,' is a representation by the plaintiff to the defendant that at the time the policy was issued, the building was really occupied, and the condition upon which the contract of insurance was based, and to entitle the plaintiff to recover it must have been true. Therefore, if you find the building was vacant, and that the defendant was

ignorant of that fact, this avoids the policy, and your verdict should be for defendant. This is the law, even though the statement be made in ignorance and without any desire to misrepresent any of the facts."

This was a succinct statement of the law, expressed in positive and unambiguous terms. The distinction between a representation and a warranty in a policy of fire insurance is an important one, and has led to much conflict of judicial opinion. The definition by Mr. Arnold in his work on Insurance, of a "warranty" is that a "warranty is a stipulation inserted in writing on the face of a policy, on the literal truth or fulfillment of which the validity of the entire contract depends." \*577. This definition, says Mr. May in his valuable work on Insurance, has met with general acceptance. The latter author, speaking of a warranty, says: "By a warranty, the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty or forfeiture of his right to recover in case of loss, should the statement prove untrue, or the course of conduct be unfulfilled." Again he says: "A warranty is an agreement in the nature of a condition precedent, and, like that, it must be strictly complied with." § 156. A warranty enters into and is a part of the contract, and the materiality is not open to discussion. No liability can arise, except within the terms of the contract, of which the warranty is a part. On the other hand, a mere representation is in its nature no part of the contract, being a statement incidental or collateral to the contract. Hence, if a representation be concerning a matter immaterial to the risk, it does not affect the contract. May Ins., §§ 183, 184. If, however, the representation be of a fact material to the risk, and be relied upon by the insurer, it is the undoubted general rule that such representation, whether made intentionally or through mistake and in good faith, avoids the policy. "It is the fact that the insurer relies upon the truth of the representation, and not upon the intention, which misleads, whether fraudulent or otherwise, that gives the right to complain." May Ins., § 181. In view of the consequences resulting from the breach of a warranty, however immaterial, the courts will not favor a construction which will convert that which was incidental or collateral into a warranty. The intent that the statement or description shall be a part of the

contract must arise upon a fair interpretation and clear intent of the words used. Whether the statement constitutes a warranty or a representation is a question of law, and is for the court. The rule, that any statement or description on the face of the policy which relates to the risk as a warranty, has been largely accepted. *Wall v. Insurance Co.*, 7 N. Y. 370. It is enough, however, for the purposes of this case, to say that when, on the face of the policy, the property is described as a dwelling-house occupied by tenants, such a statement is a warranty. It is evident, in such a case, that the property is insured as an occupied dwelling, and this fact becomes a part of the contract. To recover, the assured must bring himself within the terms of the contract upon which he sues. *Alexander v. Insurance Co.*, 66 N. Y. 464.

The second assignment of error is upon the refusal of the court to charge the jury that, "if you find that the house was vacant at the time the policy was taken out, yet if you further find the fact to be that this vacancy continued for some time; that plaintiff, Boyd, notified the insurance company of the vacancy, when the insurance company, through its agent and secretary, said, 'that all was right,' or words to that effect—then this was a waiver of the forfeiture caused by the house not being occupied when the policy was issued, and on this point your verdict should be for the plaintiff." This request is not explicit. If the notice to the secretary of the company was merely a notice that, at the time of the notice, there was a vacancy, this would not be notice that when issued a vacancy was then existing. The facts show that this house had not been occupied for nearly a month before issuance of policy, and that it continued vacant until burned, nearly a year afterward. During this time the unoccupied premises were used by wagoners and tramps as a temporary camping place. The notice given the secretary was not earlier than November. To operate as an estoppel, the facts should have been fully and fairly stated. If, with such notice, the company consented to the continuance of the policy, or made no objection when informed of the facts, then it might be held as waiving all right to afterward complain of the non-occupation of the premises at the date of insurance or at date of loss. This request leaves the extent of the notice to conjecture. A consent to a vacancy occurring during the life of the policy would not be a waiver of

a warranty that the premises were occupied at inception of contract. Provision is made in the contract for a vacancy thus occurring, and the court had already charged, concerning such a vacancy, during life of policy, "that, if defendant had notice of such vacancy of the house after it had been insured, and assented to its being vacant, this would be such a waiver of the forfeiture clause for a vacancy as would entitle plaintiff to recover." Notice of such a vacancy, and consent thereto, would only operate to waive the clause of the policy forfeiting it for a vacancy without consent during life of the policy. This contract had never had any validity, and life could not be given to it unless the company, with full notice, consented to its continuance. Good faith and fair dealing required that all the facts should have been stated. If, however, this request be regarded as requiring notice of the non-occupation at inception of the contract, then it was not error to refuse it; for the evidence of plaintiff as to what he said to the secretary does not show that he informed him of the non-occupation at issuance of contract. What he did say would only leave the impression that he spoke of a vacancy then existing, and his anticipation of an early occupancy. It is not error to refuse to charge upon a point not involved in the evidence.

The third and last assignment is upon the refusal of the court to charge that if, after the loss and knowledge of the facts by the company, a negotiation for a settlement of the loss was begun, "by which Boyd was required to go to expense and trouble in getting up an estimate of his loss or the value of the house destroyed," that this would operate as a waiver of the defenses heretofore considered. It was not error to refuse this. The company did not admit the amount of the loss, and claimed over-insurance in addition to the defenses growing out of breach of warranty of occupation. The policy required that the assured should furnish evidence of his loss, and, if required, plans and specifications of the building destroyed. The requirement of such evidence, even if it did involve expense, is not a waiver of other defenses. The cases of *Insurance Co. v. Norton*, 96 U. S. 234, and *Titus v. Insurance Co.*, 81 N. Y. 410, cited by counsel for appellant, were cases involving conduct after forfeiture, but before a loss had accrued. They do not support the assignment.

The other cases cited are not accessible. It is inconceivable, though, that they should be authority for the position that, if the insurer after a loss requires proof of loss, it thereby waives all right to set up as a defense that it is not liable by reason of the fact that it never had a valid contract at all. "Waiver" is generally but another term for estoppel. There can be no estoppel where the assured has not been misled to his prejudice. This defense was one to the whole demand. Its assertion might waive defects in proof or want of notice, but the demand of estimates of loss in no way misled plaintiff, for he knew that not only was all liability denied, but that, if any existed, the amount of his demand was contested.

The judgment must be affirmed.\*

#### FIRE INSURANCE—RECENT DECISIONS.

1. **Agent, whether of insurer or insured.**—An insurance broker called upon the assured and asked permission to place insurance for him. This was granted and the selection of the company left to the broker. The broker applied for the insurance to a company with which he never before or afterward had dealings. The application was granted, a policy filled out, the name and address of the broker was indorsed thereon, and it was then delivered to the broker, who, in turn, delivered it to the assured. The policy provided that if "any broker \* \* \* have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company." The premium was paid to the broker, but did not reach the company. Held, in an action on the policy for a loss which occurred after the company had notified the assured of the cancellation of the policy for non-payment of the premium, that, even if the assured could be permitted to show that the broker was the agent of the company in procuring the insurance, there was no evidence to support such a finding. *Wilber v. Williamsburgh City Fire Ins. Co.*, 122 N. Y. 439; 25 N. E. Rep'r, 926.

An insurance broker procured from the general agent of defendant company for plaintiffs a policy of insurance, which was delivered on condition that it should not take effect until approved at the home office of the defendant. Held, that the broker continued to be the agent for plaintiffs until the policy had been acted on at the home office, and notice to the broker of its rejection was notice to plaintiffs. *Young v. Newark Fire Ins. Co.*, 59 Conn. 41; 22 Atl. Rep'r, 82.

2. **Agency—estoppel to deny authority.**—Where a special agent and adjuster of an insurance company, pending negotiations after loss, confers with assured and her attorney concerning the proofs thereof, and employs an attorney to assist in the investigation of the loss, and seeks to secure a cancellation of her claim on the repayment of the premium, and, without informing her of the existence of any limitation on his authority to bind his principal, positively

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\* Reported in 16 S. W. Rep'r, 470.

refuses to pay the claim, the company will be estopped to deny the agent's authority to bind it, and the agent's refusal to pay will constitute a waiver by the company of the provision of the policy allowing sixty days after proof of loss in which to make payment. *California Ins. Co. v. Gracey*, 15 Cal. 70; 24 Pac. Rep'r, 577.

3. *Application — filling in by agent of company — estoppel to impeach truth of answers.* — An agent, authorized to take applications for insurance, should be regarded to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company and not to the assured. *State Ins. Co. v. Gray*, 44 Kans. 781; 25 Pac. Rep'r, 197. When the agent thus authorized by his company to take applications for insurance, without the knowledge of the applicant, writes false answers to questions contained in the application, contrary to the directions of the applicant, who makes true answers to such questions, the company will be estopped by the answers thus written by its agent. *Ibid.*

4. *Application — false statements inserted by fraud of company.* — In an action on a fire policy it appeared that both the application and policy contained a stipulation that the assured should keep his books of account, inventories, etc., in an iron safe, which was not done, and they were destroyed in the fire. Plaintiff's evidence was that this stipulation was inserted in the application by the fraud of defendant, and that he did not know of its presence in the policy until the occurrence of the fire. Held, that a verdict for plaintiff would not be disturbed. *Liverpool & L. & G. Ins. Co. v. Morris*, 84 Ga. 759; 11 S. E. Rep'r, 895.

5. *Arbitration clause — construction — effect and waiver of.* — A policy provided for arbitration as to the amount of loss, and gave the insurer the right to take the property insured at the value fixed by the arbitrators. The assured, after agreeing to arbitration, revoked the submission, and declined to be bound. He then had the goods appraised, and sold them. Held a forfeiture of the policy. *Morley v. Liverpool & London & Globe Ins. Co.*, 85 Mich. 210; 48 N. W. Rep'r, 502.

A policy of fire insurance provided for an appraisal of each article damaged or destroyed by fire, which appraisal was to be submitted as part of the proofs of loss, and that, in case differences shall arise touching any loss or damage after proof thereof has been received, the matter shall be submitted to arbitrators, whose award in writing shall be binding on the parties as to the amount of the loss. Held that, where the company received proofs of loss from the insured, without objection either as to their form or substance, the refusal of the insured to submit to an award of arbitrators could not be pleaded in bar to an action on the policy, which did not contain any provision that no action should be maintained on it until after such award. *Hamilton v. Home Ins. Co.*, 187 U. S. 370; 11 Sup. Ct. Rep'r, 183.

A provision in a policy that no action for a loss thereunder shall be maintained unless an award of damages by arbitrators, in case of a difference between the parties as to the amount of the loss or damage, shall first have been returned, does not necessitate as a condition precedent to the bringing of an action that there be a submission to arbitration, where the insurance company



denies its liability to pay any sum. *Bailey v. Aetna Ins. Co.*, 77 Wis. 336; 48 N. W. Rep'r, 440.

An arbitration clause in a fire insurance policy provided that the amount of loss should be determined by appraisers to be selected one by the company, and one by the insured, and that their award should be binding and conclusive as to the amount of loss, but that no appraisal nor agreement for appraisal should be construed as an admission of the validity of the policy, or as a waiver of any of its conditions. Held, that the clause was valid, and in an action on the policy, where defendant had pleaded that the loss had been settled by arbitration, it was error to instruct the jury that the agreement to submit to arbitration and the award of the appraisers were not competent, either to support the plea of arbitration and award or as a binding agreement on the parties thereto. *Herndon v. Imperial Fire Ins. Co.*, 197 N. C. 183; 12 S. E. Rep'r, 126.

6. **Assignment—consent of agent—waiver of condition.**—A firm, agents of an insurance company, procured a policy on the property of their debtor, payable to themselves in case of loss. Afterward, the debtor sold the property, and assigned the policy to the purchaser, with the consent and at the solicitation of the agents. The policy was conditioned to be void, if assigned in case of sale, unless the assignment was approved by the president or secretary of the company. This consent was never asked for, nor obtained. Held, that the policy was forfeited, as there was no waiver of the condition as to assignment, since the agents were in the first place the beneficiaries, and could not, therefore, bind the company by their acts. *Cascade Fire & Marine Ins. Co. v. Journal Pub. Co.*, 1 Wash. 453; 25 Pac. Rep'r, 331.

7. **Binding slip—cancellation of—notice.**—Where an insurance company gives to an applicant for insurance a "binding slip," whereby it agrees to insure the applicant's property, the slip to be binding until the policy is delivered, the company has the same rights as to cancellation of such slip as if it contained all the conditions as to notice and agency found in the company's ordinary policies. *Karelsen v. Sun Fire Office*, 123 N. Y. 545; 25 N. E. Rep'r, 921. Where such policies provide that the company may cancel the insurance by giving notice, and that if any broker has procured such insurance he shall be deemed the agent of the insured, notice of cancellation to the broker who procured the insurance is sufficient, before the policy is delivered, to cancel the insurance evidenced by the "binding slip." *Ibid.*

8. **Cancellation—notice of on day of loss.**—Where notice of the cancellation of insurance is given by the company on the very day of the fire, and the testimony is conflicting as to whether it was given before or after the fire began, it is proper to refuse to instruct the jury that, if notice was given on the day of the fire, such notice would terminate the risk, since such instruction takes from the jury the decision of the hour when the notice was given. *Karelsen v. Sun Fire Office*, 123 N. Y. 545; 25 N. E. Rep'r, 921.

9. **Estoppel to deny contract or power of agent.**—Where the recognized agent of an insurance company issues a policy of insurance, receives the premium, and forwards it to the company, and, after waiting the usual time for a reply, and receiving none, delivers the policy to the insured, in an action on the policy, the company cannot deny its own power to issue the policy or the authority of the agent. *Hoge v. Dwelling-House Ins. Co.*, 138 Penn. St. 66; 20 Atl. Rep'r, 989.

**10. Insurable interest — beneficial ownership and legal title.**—Plaintiff purchased a farm, with the buildings, paying for the same with his own money; and at his direction the deed was made to his wife, upon her agreement to reconvey to him at his request. Plaintiff had possession, and the entire beneficial use, of the farm and buildings, using the same for the support of his family. Held, that he had an insurable interest in the buildings. *Horsch v. Dwelling-House Ins. Co.*, 77 Wis. 4; 45 N. W. Rep'r, 945.

**11. Representation as to distance of nearest building — warranty.**—In an application for insurance, covenanting that the representations therein were true so far as "known to the applicant and material," plaintiff represented her building as ninety feet from the next nearest, without knowing the exact distance to be seventy-two feet. Held, that such statement was not a warranty, although the policy provides that the application shall be considered a part thereof, "and a warranty by the assured." *Noone v. Transatlantic Ins. Co.* 88 Cal. 152; 26 Pac. Rep'r, 108.

**12. Representation, whether a warranty — statute construed.**—Although the Civil Code of California, section 2607, provides that "a statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof," yet, where it appears from the whole policy that such an expression was not intended as a warranty, it will not be held to be such; and where the policy recites that "it is understood and agreed that the within-described premises have been leased by \* \* \* and it turns out that the premises were not then so leased, though they had previously been, the policy is not avoided, it appearing that there was no intentional misstatement by the assured. *National Bank v. Union Ins. Co.*, 88 Cal. 497; 26 Pac. Rep'r, 506.

A statement in the policy that the building is occupied in a certain way is a warranty that it is occupied in that way at the time that the contract is entered into, and the fact that it was not so occupied at that time is a good defense to the action. *Baker v. German Fire Ins. Co.*, 124 Ind. 490; 24 N. E. Rep'r, 1041.

**13. Time of payment — where action prematurely brought.**—Where an insurance policy stipulates that the loss shall not be payable till sixty days after proof of loss, an action commenced fifty-eight days after proof of loss is premature, unless the company has absolutely refused to pay the loss. *Cascade Fire & M. Ins. Co. v. Journal Pub. Co.*, 1 Wash. 452; 25 Pac. Rep'r, 331.

Where a policy of insurance allows the company thirty days after proofs of loss are completed to rebuild or pay the loss, and the first proofs are returned to assured for corrections, which are made, the time begins from the receipt of the corrected proofs. *Kelly v. Sun Fire Office*, 141 Penn. St. 10; 21 Atl. Rep'r, 447.

A condition in a fire policy that a loss shall be paid "sixty days after due notice and proof of the same, made by the assured, are received at the office of the company," is waived by an absolute denial on the part of the company of any liability, and the assured need not wait sixty days before suing therefor. *California Ins. Co. v. Gracey*, 15 Col. 70; 24 Pac. Rep'r, 577.

**14. Title — husband insuring wife's property.**—An insurance policy issued on a dwelling-house in the name of a husband, when the title was in his wife, the company not being informed that the husband was not the legal owner,

is void. *Trott v. Woolwich Mut. Fire Ins. Co.*, 83 Me. 363; 22 Atl. Rep'r, 245.

**15. Title—stipulation for sole and unconditional ownership—waiver.**—A policy of insurance was issued on an oral application and statement to the agent of the company. The agent knew that the legal title of the property stood in another person, and that the assured was only entitled to a deed on payment of a certain sum. The policy contained the provision that it should be wholly void unless consent in writing was indorsed thereon by the company, if the assured was not the sole and unconditional owner of the property; or if the building intended to be insured stood on ground not owned in fee-simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, was not truly stated in the policy; or if any change take place in the title, interest, location or possession of the property, by sale, transfer or conveyance, in whole or in part. Held, that this provision applied only to such changes as arose after the policy had been delivered and accepted, and not to the condition of the property at the time the policy was issued. *Hoose v. Prescott Ins. Co.*, 84 Mich. 309; 47 N. W. Rep'r, 587.

**16. Vacancy—increase of risk.**—Under Maine Statutes, chapter 49, section 20, to avoid a policy of fire insurance stipulating that, whenever the buildings insured shall become vacant, the insurance thereon shall cease, it must be shown that not only have the buildings become vacant in violation of the terms of the policy, but that the risk was thereby increased. *White v. Phoenix Ins. Co.*, 83 Me. 279; 22 Atl. Rep'r, 167. Under the statute the burden is upon the insurance company to show an increase of risk; and, when the vacancy is shown, it has such presumption in its favor that, if not rebutted, is sufficient to prove the fact; but, when other facts appear, it is for the jury to say whether the presumption shall still prevail, or whether it has been rebutted, and whether, on the whole evidence, the risk is shown to have been increased. *Ibid.*

**17. Vacancy—waiver of condition as to.**—The facts that an insurance agent was notified by an assured that the insured premises had become vacant and that assured would move in shortly, and said, "All right," and that he would fix the policy, do not constitute a waiver of a provision in the policy that it shall be void if the premises become vacant without written consent of the company, where the policy provides that "the use of general terms, or any thing less than a distinct, specific agreement, \* \* \* shall not be considered as a waiver of any \* \* \* condition," and there is no evidence of the agent's powers except that the policy was indorsed, countersigned and delivered by him. *Messelback v. Norman*, 122 N. Y. 578; 26 N. E. Rep'r, 34.

**18. Waiver of forfeiture.**—Where the company indorses upon a policy its consent that it may continue in force, notwithstanding a temporary vacancy, this will not waive a forfeiture previously incurred, of which the company was ignorant. *Trott v. Woolwich Mut. Fire Ins. Co.*, 83 Me. 363; 22 Atl. Rep'r, 245. Where the insurance company, two months after a forfeiture had been incurred, procured the examination of the assured according to the terms of the policy, this was a waiver of the forfeiture. *Morley v. Liverpool & L. & G. Ins. Co.*, 85 Mich. 210; 48 N. W. Rep'r, 503.

An insurance policy made the consent, in writing, of the insurer to any change in interest in the property a condition of its continuance in force. The

property was transferred to plaintiff without such written consent, and the policy assigned to him. The policy was presented by plaintiff's broker, for indorsement of such consent on it to an officer of the insurance company, who returned it, saying that it had been canceled. Held, that the want of a formal consent in writing was not supplied by the inference that the company's consent would be given if the policy had not been canceled and an admission that it was not canceled. *Lett v. Guardian Fire Ins. Co.*, 125 N. Y. 82; 25 N. E. Rep'r, 1068.

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WARDWELL V. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Minnesota, July 7, 1891.)

1. CARRIERS. MISTAKE IN CASH FARE. DEMANDING ADDITIONAL AMOUNT. EJECTION. RIGHTS AND DUTIES OF COMPANY. Plaintiff, without a ticket, though he had full opportunity to procure one, boarded defendant's train at Faribault, to go to Owatonna, and, when he told the fare collector where he was going, the latter told him the fare was fifty cents, which he paid. This was more than the ticket fare, but six cents less the train fare. Before the train arrived at Walcott, the first station at which the train was to stop, the collector informed plaintiff of his error in the amount of the fare, and required him to pay the six cents, which plaintiff refused, and the collector told him unless he paid it, he must leave the train. On arrival at Walcott, where the train stopped, the plaintiff persisting in his refusal, the collector put him off, and then returned him the fifty cents, less the fare from Faribault to Walcott. Held, that the collector, on discovering the mistake, might, within a reasonable time, require plaintiff to pay the other six cents.

2. Also that, notwithstanding his first refusal, the plaintiff might, at any time before the arrival at Walcott, still pay the six cents, and secure the right to be carried to Owatonna.

3. Also that the collector's retention of the fifty cents till the arrival at Walcott was not a waiver of the right to require payment of the six cents. Qualifying *Du Laurans v. Railroad Co.*, 15 Minn. 49 (Gil. 29).

4. Also that the company had a right to be paid the fare from Faribault to Walcott, and the collector might retain it out of the fifty cents. Overruling *Du Laurans v. Railroad Co.*, 15 Minn. 49 (Gil. 29).

5. Also that the collector could not retain the entire amount, and also put plaintiff off, but could put him off only upon first returning to him the fifty cents, less the fare to Walcott, and, having put him off before doing so, the expulsion was wrongful.

**A** PPEAL from district court, Steele county, Buckham, judge.

*F. W. Root* (*W. H. Norris* of counsel) for appellant. *Amos Cogswell* and *Sawyer & Sawyer* for respondent.

GILFILLAN, C. J. The plaintiff, without procuring a ticket; though he had full opportunity to do so, boarded a passenger train of defendant at Faribault to go to Owatonna. The ticket fare was forty-six, the train fare fifty-six, cents. Soon after the train started the fare collector came to plaintiff, and asked him where he was going, and, on being told to Owatonna, said the fare was fifty cents, which plaintiff then paid him. A few minutes after, and before the train reached Walcott, the first station from Faribault, the collector came again to plaintiff, and told him he had made an error in the amount of the fare, and insisted that he should pay the other six cents, and, on plaintiff refusing, told him unless he paid it he would put him off the train. Plaintiff still refused, and on the arrival of the train at Walcott, plaintiff persisting in his refusal, the collector put him off, and, after he was off, returned to him the difference between the 50 cents and the fare from Faribault to Walcott.

Assuming (what in view of the defendant's regulations posted up in its passenger stations and passenger-cars, can hardly be assumed) that the collector had authority to accept for the fare any less than the fifty-six cents, and waive the company's right to full train fare, the receipt by the collector, through mistake, for the full fare, of less than the fare, did not amount to such waiver. The collector had a right, on discovering the mistake, to require the plaintiff, certainly within a reasonable time, on informing him of the error, to pay the remainder of the train fare, just as any one, on discovering a mistake in payment, may, within a reasonable time, require its correction. And it was the duty of the plaintiff, on being informed of the error, to pay the remainder of the full train fare, as demanded by the collector. Nor was the collector's retention of the money paid him by plaintiff (still assuming his authority to waive any part of the train fare) until the arrival of the train at Walcott, and while the question whether the plaintiff would pay the remaining six cents or leave the train was an open one (for notwithstanding his previous refusal, the plaintiff might, until the arrival at Walcott, where the train was to stop without regard to his matter, still pay and secure the right to go to his intended destination), such a waiver and especially as the collector insisted on payment of full train fare, and informed plaintiff that he must pay or leave the train. The rule laid down in *Du Lurans v. Railroad Co.*, 15

Minn. 49 (Gil. 29), to the effect that when a passenger tenders in good faith, on the train, the ticket fare as full fare to his place of destination, and the conductor takes and retains it, he thereby waives the right to require the passenger to still pay the difference between the ticket and train fare, is (assuming the conductor's authority to waive it) undoubtedly correct as applied to a case where, from the circumstances attending the tender, receipt and retention of the money, the passenger is justified in the belief that it was accepted in full for his fare to the place of his destination. Thus, if the conductor should receive and retain it without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for non-payment, the latter would have the right to assume that the amount paid was satisfactory. But it cannot correctly be applied to a case like this. It would be equivalent to the proposition that the collector waived payment while insisting upon it, a proposition contradicting itself.

To determine whether he would pay the difference demanded, or persist in his refusal and leave the train, the plaintiff had until the train stopped at a place where he might be put off. So long as he had that election, the collector might retain the amount paid him to abide it. As soon as it was made, to-wit, when plaintiff finally refused at Walcott, the right of the collector to retain the entire sum paid ceased, except he chose to retain it for the very purpose for which it was paid him; that is, for the full fare to Owatonna. He could not retain the entire sum, and also eject the plaintiff. As precedent to the right to expel him from the train, he should have returned to plaintiff what he was entitled to of the money, and until he did that he had no right to put him off. It is true he returned it to him immediately after the expulsion. But the wrong had then already been committed, and could not be repaired by doing what ought to have been done before the expulsion. We have said the collector ought to have returned to him what he was entitled to of the money (not the whole of the money), because we hold that where a passenger refuses to pay the fare rightfully demanded of him to his place of intended destination, and the carrier puts him off at a proper place, because of such refusal, the carrier has a right to be paid the proper fare for carrying him to that place,

and to retain it out of any money the passenger may have paid on account of fare. This is contrary to what was decided (the court being divided upon it) in the *Du Laurans Case*. The reasons given for the decision in that case were that the passenger does not intend to make a contract to be carried to the place short of his intended destination, where he is put off, and that the carrying the passenger in that case to the place where he was put off was no benefit, but, on the contrary, a detriment to him. When, under circumstances that imply a request, a railroad company carries a passenger from one point to another, it is no concern of the company, as affecting its right to compensation, that it is or is not to the advantage of the passenger to be carried to and left at the latter place, and it is, therefore, immaterial. The sole question is, was the service rendered at the request, express or implied, of the passenger? When one voluntarily enters a train of cars, and expressly requests to be carried to a particular place, but refuses to pay the rightful fare to that place, so that the company has a right to put him off before reaching that place, a request must be implied to be carried to the place where the company may rightfully put him off. His intention must be taken to be to ride to the destination expressed by him, if the company will carry him to that place, without his paying the fare, and, if it will not, then to ride to such place where the company may rightfully put him and does put him off. That in such case he may be carried to and left at such place is what he must be presumed to expect and intend. And he can have no right to expect that the company will put him off, till the train reaches its first regular stopping station. The train need not stop for the mere purpose of putting him off. The facts upon which we hold that the expulsion of the plaintiff from the train was wrongful were established at the trial, and not disputed, so that he was entitled to a verdict. The instructions of the court, assigned as error, going only to the right to a verdict, were, therefore, if erroneous, harmless. We see no error in the instructions touching the measure of damages.

Order affirmed.\*

**Railroad companies — ejecting passenger — liability — damages.**— On this subject we refer generally to the following cases in these reports: *Kan-*

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\* Reported in 49 N. W. Rep'r, 206.

sas City, etc., R. Co. v. Riley, 4 Am. R. R. & Corp. Rep. 654, and note; Edwards v. Lake Shore, etc., R. Co., 8 Am. R. R. & Corp. Rep. 166, and note; Chicago City Ry. Co. v. Pelletier, 2 Am. R. R. & Corp. Rep. 616, Reese v. Pennsylvania R. Co., 1 Am. R. R. & Corp. Rep. 147.

## MULLAN V. WISCONSIN CENT. R. CO.

(Supreme Court of Minnesota, July 3, 1891.)

1. CARRIERS OF PASSENGERS. INJURIES BY FELLOW-PASSENGERS. LIABILITY. It is the duty of a railway carrier of passengers to exercise the highest diligence reasonably practicable to preserve order on its trains, and protect passengers against violence, abuse or injury from fellow-passengers. This duty is exercised under an implied police power to prevent an abuse of their privileges by passengers.

2. EVIDENCE. Evidence reviewed, and held not to show a breach of such duty by the defendant in this case.

**A**PPEAL from district court, Ramsey county, Otis, judge.

*Kueffner & Fauntleroy* for appellant. *Lusk, Bunn & Hadley* for respondent.

VANDERBURGH, J. This action is brought against the defendant to recover damages for an assault committed upon plaintiff by a fellow-passenger on board of one of defendant's cars. The plaintiff was a passenger, and entitled to protection as such. Railway carriers of passengers are bound to exercise the highest care and diligence in the conduct and management of their business, to prevent accidents or injuries to passengers on their trains. This is the general rule, as applied to the ordinary discharge of their duties as carriers. In respect to the danger of injuries from the misconduct of fellow-passengers, and the duty of enforcing proper police regulations, the obligation of the carrier is qualified or limited by the nature of its relation to the passenger. It has no right either to refuse to receive or to expel a passenger, except for good cause. It must exercise the greatest diligence consistent with its obligations to the public and all the passengers, and neglect no reasonable precaution to protect passengers from insult or injury from its servants or fellow-passengers; but as respects passengers there is no such privity between them and the carrier as to make the latter directly liable for their wrongful acts (*Carpenter v. Railroad*



Co., 24 Hun, 107), and it can only interfere under an implied police power to prevent an abuse of their privileges as passengers. It is held in general terms that the carrier is bound to exercise the utmost diligence in maintaining order and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances, and the number and character of the persons on board. *Flint v. Transportation Co.*, 34 Conn. 554. If this duty is neglected without good cause, and a passenger receives injury which might have been reasonably anticipated or naturally expected, from one who is improperly received or permitted to continue as a passenger, the carrier is responsible. *Putnam v. Railroad Co.*, 55 N. Y. 113; *Weeks v. Railroad*, 72 N. Y. 59. That is to say, the strict rule of duty is to be applied in view of the relation which the carrier sustains to all the passengers, and the circumstances of each particular case calling for its exercise. In the case at bar, at the time of the assault upon plaintiff, his assailant was the only other passenger in the car. After the plaintiff and the conductor had adjusted a matter of difference as to his fare, and the conductor was passing down the car, the other passenger, plaintiff's assailant, made an insulting remark to plaintiff accompanied by an oath, which resulted in an altercation, which wound up by plaintiff calling the other a "liar," whereupon the latter "jumped right up upon the impulse of the moment," and "grabbed" plaintiff by the neck, and commenced striking him upon the head. As soon as plaintiff could get his arm loose, he struck his assailant "in the jaw," and the conductor interfered to part them, saying, "This has got to stop."

It is evident that the struggle was very animated, and occupied but few seconds, and that the assault was sudden and unexpected, for the plaintiff says on his cross-examination: "I did not anticipate any trouble about the matter. He jumped up and grabbed me by the neck, and commenced knocking me in the face and head." Immediately after the plaintiff called him a liar, he says, "he jumped up in his seat, and jumped over at me and struck me." After the conductor interfered and separated the parties, plaintiff says there was no appearance of further trouble. The conductor took plaintiff down the aisle, and waited till the other party washed his face. His cheek had been cut by the blow which

plaintiff gave him. After the plaintiff had washed the blood from his own face, his assailant, while passing along the aisle near where the plaintiff and the conductor were, suddenly turned and struck plaintiff again, in the mouth. The conductor interfered promptly again, grabbed hold of him, "and that ended it." The conductor took him into the baggage-car, and plaintiff saw him no more. The second assault was evidently unlooked for and without warning. We think the court properly dismissed the action upon the plaintiff's own evidence, for, apart from the fact that the plaintiff must share the blame for the disturbance, we are unable to see wherein the conductor failed in his duty or neglected any reasonable precaution on the premises. It is true the plaintiff states in respect to the first assault that the conductor might have interfered sooner, but this appears to be a conclusion not borne out by the facts, which are particularly detailed by the witness in his testimony. The parties were very much excited, and the several blows must have passed between them in a very few seconds. It is not shown that the parties were not separated as promptly as the circumstances would admit, and it is sufficiently clear that the assault was in each case sudden and unexpected. The plaintiff failed to make case for the jury, and the order denying a new trial is affirmed.\*

**1. Railroad companies — Liability for assault upon passenger by employee of company.**— The company was held liable for such assaults in the following cases: *Conger v. St. Paul, etc., R. Co.*, 45 Minn. 207; 47 N. W. Rep'r, 788; *Dwinelle v. New York Central, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 492; *Savannah, etc., R. Co. v. Bryan*, 8 Am. R. R. & Corp. Rep. 584. The subject is treated in note, 2 Am. R. R. & Corp. Rep. 500.

**2. Assault by fellow-passenger.**— In an action for injuries received by plaintiff, a colored man, while a passenger on defendant's train, it appeared that he was requested to leave a car where he was seated and go into another car, because of his boisterous conduct, but refused to go into the other car, and remained on the car platform, where he was assaulted by a fellow-passenger and received the injuries sued for. A judgment for the defendant was affirmed. *Royston v. Illinois Central R. Co.*, 67 Miss. 876; 7 So. Rep'r, 320.

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\* Reported in 49 N. W. Rep'r, 249; 46 Minn. 474..

## RICHMOND V. CHICAGO &amp; W. M. RY. CO.

(Supreme Court of Michigan, July 23, 1891.)

1. RAILROAD COMPANIES. ACCIDENTS AT CROSSINGS. CONTRIBUTORY NEGLIGENCE. In an action against a railroad company to recover damages for the alleged negligent killing of plaintiff's intestate, it appeared that decedent was a street-car driver, and that in coming toward defendant's track he slowed his car to a walk when he was within about twenty-five or thirty feet of the railroad crossing and that he could have seen the approaching train seventy-five feet down the track when twenty-five feet away from the crossing, or could have seen the train one hundred and sixty feet down the track when within sixteen feet of the crossing; that deceased did not stop his car, but seemed to be looking at his horse with his hand on the brake; that there was a flagman regularly stationed at the crossing, but that he was in the flag-house, and gave no warning of danger. Held, that it was a question for the jury to determine whether the absence of the flagman from his post of duty warranted deceased in presuming that it was safe to cross defendant's track at the time, and a finding that deceased was not guilty of contributory negligence would not be disturbed.

2. DEATH BY WRONGFUL ACT. MEASURE OF DAMAGES. Howard's Statutes of Michigan, section 3391, provide that, whenever the death of a person shall be caused by the neglect of any railroad company, the railroad company, which would have been liable if death had not ensued, shall be liable for damages, notwithstanding the death of the person so injured. Section 3392 provides that every such action shall be brought in the name of the personal representatives of such deceased person, and the jury may give such amount of damages as they shall deem fair and just, to the persons who may be entitled to such damages when recovered. Held, that where a railroad company negligently caused the death of one who contributed to the support of his mother and invalid sister, and an action is brought against the company, the proper measure of damages, under the statute, is the amount which deceased would have contributed to the support of his mother during her expectancy of life, in proportion to the amount he was contributing at the time of his death, and the amount he would have contributed to the support of his sister after the death of his mother, not exceeding the time of his expectancy of life.

3. DISTRIBUTION OF DAMAGES. BY WHAT STATUTE GOVERNED. Where damages are recovered by the personal representative of one killed by the negligence of a railroad company, the distribution of the amount recovered is governed by the statute in force at the time of the killing.

**E**RROR to superior court of Grand Rapids, Edwin A. Burlingame, judge. Action by Olney H. Richmond, administrator of Cady W. Sherwood, deceased, against the Chicago and West Michigan Railway Company, to recover damages for the alleged negligent killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Affirmed.

*Smith, Nims, Hoyt & Erwin (M. J. Smiley, of counsel) for appellant. J. M. Jamison (Montgomery & Bundy, of counsel) for appellee.*

MORSE, J. The plaintiff's intestate in this case was the driver of a street-railway car in the city of Grand Rapids, and on the 23d day of April, 1889, while driving his car on West Fulton street, in said city, was killed by a collision with a train of the defendant company at the street crossing. This is an action for damages on account of his death. Plaintiff recovered judgment in the Kent circuit court in the sum of \$5,313. At the close of plaintiff's proof, the defendant demurred to the evidence and asked that a verdict be directed in its favor, on the ground that the plaintiff was not in the exercise of due care and caution when the accident occurred, and, therefore, guilty of contributory negligence. This motion was denied, and the defendant thereupon put in proofs. This action of the trial court and other errors are alleged as reasons for the reversal of this judgment.

We will first examine the question whether the court erred in permitting the plaintiff to go to the jury as to his own negligence. This must be decided, as is admitted by defendant's counsel, upon the case as made by the testimony on the part of the plaintiff. This case is substantially as follows: Between the hours of four and five in the afternoon of April 23, 1889, Sherwood, with his car drawn by one horse, came down West Fulton street, approaching defendant's track. West Fulton street runs nearly east and west, and the railroad track crosses it nearly at right angles. Sherwood was going east. About one hundred and eighty-five feet west of the defendant's track is another railroad crossing, that of the Lake Shore and Michigan Southern Railway. Sherwood was observed crossing this latter track on a walk. Beyond that to the east it is down grade, and he then started his horse on a trot, and continued until within twenty-five or thirty feet of defendant's crossing, when he "slowed down" to a walk. At this crossing, on the north side of West Fulton street and the west side of the railroad track, is a shanty used for a flagman who was stationed there to give warning of the approach of trains to the passers-by. To the north the view of the track was comparatively unobstructed, but upon the south side of the street, and to

the west of the railroad track, was situated a lumber-yard, lumber office, coal-shed, lumber-sheds, and piles of lumber and posts, more or less obstructing the view of cars coming from the south. On the day in question there was at least one car loaded with lumber upon a side track in the lumber-yard, which added to the obstructions.

The witnesses who testified to seeing Sherwood approach the track did not all see him in the same place; some did not notice him until he was within twenty-five or thirty feet of the track, and others not until he was right upon it. Others saw him as he crossed the Lake Shore and Michigan Southern track, and until he was injured, except such times as they were looking at the cars. They do not agree as to what he was doing, except that he was on a walk within twenty-five or thirty feet of the track, and had hold of the lines, and some say one hand on the brake, and was standing in his usual place upon the front platform of his car. Some did not notice where he was looking. One witness says he looked straight ahead all the while, as if he was looking at the horse; others, that he looked to the north all the time, and toward the watchman's shanty. One witness, and the only one who so testifies, says that he saw Sherwood's head go both ways. He first observed him forty or fifty feet back of the track. Just as Sherwood got to the track a train of nine cars, detached from the engine, came down the track from the south. "Sherwood then stopped, put his hand on the brake, tried to 'brake up,' but could not. The horse was on the track, his forward feet across it. The horse gave a jerk, and pulled Sherwood over the dash-board and under the car." Sherwood died of the injuries there received. These cars were running, as testified by plaintiff's witnesses, at the rate of from eight to twelve miles an hour, the majority estimating the speed at from eight to ten miles an hour. There was no warning of the approach of these cars, except the noise they made in running. There was no lookout on the forward car. There was a man standing on the third car from the front of the train, but he was looking north-east, and giving no attention to the crossing. The flagman was not at his usual post of duty, and no signal or warning was given by him until the horse was on the track. He then ran out of the shanty or flag-house in his shirt sleeves, and bare-headed, but too late to warn Sherwood of his danger. The

plaintiff's claim was that the defendant was negligent in the following particulars: (1) That the cars were run at too high a rate of speed in violation of the city ordinance — a speed which also in view of the nature, locality and surroundings, was, as a matter of fact, dangerous and negligent; (2) that no proper signals were given to warn those approaching the crossing, and particularly the deceased, of the approach of the train; (3) the flagman was absent from his post of duty, which was outside of the flag-house with his flag to give warning (but was present in the flag-house in view of the deceased) and failed to give any warning of the approach of the train.

The negligence of the defendant is apparent from the evidence on the part of the plaintiff, and need not be discussed further. It is contended by the defendant's counsel that the plaintiff's intestate was guilty of negligence as a matter of law; that there were places on the line of Sherwood's course before he reached the track where he could have seen these cars approaching, had he looked to the south; that at a point forty feet west of the railway crossing the cars could have been seen before the lumber office obstructed the view; that a hundred feet of the track was visible by looking through between the office and the lumber-piles; also that at a point twenty-five feet from the crossing, a car could be seen seventy-four feet south of the crossing; and from a point sixteen feet west of the crossing a car could be seen approaching from the south one hundred and sixty-seven feet south of the crossing, the street-car track being in the center of the highway. We do not think from the testimony produced by the plaintiff that Sherwood could have seen the cars approaching from the south after he left the crossing of the Lake Shore and Michigan Southern railway until he came within about twenty feet of the crossing. If he had looked, then he would have undoubtedly seen these cars in time to have stopped and avoided a collision. And it is pretty apparent — almost absolutely certain, from the plaintiff's own showing — that he did not look south within said twenty feet, until his horse was upon the track. Whether he was negligent depends in a great measure upon whether or not he had a right to rely, under the circumstances, upon the absence of the flagman, and the lack of any signal of danger from him.

It is claimed by defendant's counsel that the obstruction of the view to the south, and the absence of the watchman from his post, called upon Sherwood to have stopped, and looked and listened, before he attempted to pass this crossing. This claim would be correct, if, at this street crossing, no flagman had been stationed to give warning. But the testimony shows that a flagman had been kept at this point for three or four years, whose duty it was to signal by a flag in the street the approach of trains. It is not the law of this state that, under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways, and to listen for approaching trains. It is generally required, but it is not a rule of universal application. Every case must depend upon its own circumstances, and it would be unreasonable to apply such rule, under all circumstances, without regard to the condition of things at the time. *Cooper v. Railroad Co.*, 66 Mich. 266; 33 N. W. Rep'r, 306. Nor is a traveler compelled, under all circumstances, to stop before a crossing, if his view is obstructed from one way. He is only required to take such precaution as an ordinary prudent man would under like circumstances, and whether or not he did use such care is generally a question for the jury. See *Guggenheim v. Railway Co.*, 66 Mich. 157, 158; 33 N. W. Rep'r, 161, and cases cited. Plaintiff's counsel contend that, it appearing that the defendant had stationed a flagman at this crossing, whose duty it was to warn parties about to cross of approaching trains, it was for the jury to say whether the deceased, in keeping his eyes directed to the flagman for the very purpose of observing a signal at the earliest moment that it could be given, was not exercising due care. They cite the following cases in support of this contention: *French v. Railway Co.*, 116 Mass. 537; *Sweeny v. Railway Co.*, 10 Allen, 377; *Railway Co. v. Hutchinson* (Ill.), 11 N. E. Rep'r, 856; *Pennsylvania Co. v. Stegmeier* (Ind.), 20 N. E. Rep'r, 843; *Glushing v. Sharp*, 96 N. Y. 676; *Railroad Co. v. Schneider* (Ohio), 17 N. E. Rep'r, 321; *State v. Railroad Co.* (Me.), 15 Atl. Rep'r, 39; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 27 Fed. Rep'r, 159; *Tyler v. Railway Co.*, 137 Mass. 238; *Railway Co. v. Yundt*, 78 Ind. 373.

In 116 Massachusetts the submitting of the question of contributory negligence to the jury was not affirmed upon the ground

of the absence of the watchman alone, but in connection with the further fact that a train had just passed, and plaintiff did not suppose or have reason to suppose that another would follow so closely as they did, the cars doing the injury having been cut off from another train, and "shunted" down the track. In 10 Allen the flagman signaled the traveler to come on, and he went upon the track relying upon such invitation. It was said by the court: "No express invitation need have been shown. It would only have been necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing." In *Railway Co. v. Yundt*, 78 Ind., the court say: "If the defendant had, for a considerable time before the accident, kept a flagman at the crossing to give signals on the approach of trains, and if the plaintiffs had been in the habit of crossing the railroad at that place, and observing the signals, and if, on the occasion of the accident, no signal was given, the plaintiffs not knowing that the services of the flagman had been dispensed with, these facts might be considered by the jury, in connection with all the other circumstances, in determining whether or not the plaintiffs were free from contributory negligence." It is also said in *Railway Co. v. Hutchinson* (Ill.), 11 N. E. Rep'r, 856: "We are aware of expressions by this court, when passing upon the law and fact, and of like expressions by other courts of the highest respectability, that the failure of one approaching a railroad crossing to pause and look for the approach of trains was such negligence as would, in the case there under consideration, preclude a recovery. But we are not prepared to say, as a matter of law, that a person approaching a railroad crossing, when there is nothing apparent to warn him of danger, and at which he knows a flagman is stationed, whose duty it is to warn all persons of danger from running trains, is required to look elsewhere than to the flagman. The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty. It may be that in this particular case a reasonably prudent and careful man would do more than observe the absence of the ordinary signal by the flagman; but, if so, the facts and circumstances should be submitted to the jury, to be considered by them in



determining whether the party had, under all the circumstances, exercised ordinary care and caution to prevent injury."

In *Glushing v. Sharp*, 96 N. Y. 676, and in *Railroad Co. v. Schneider* (Ohio), 17 N. E. Rep'r, 321, there were gates at the crossings, attended by a gateman, which gates were closed when there was danger of an approaching train, and open when there was no such danger. In both these cases, the gates being open, the persons injured drove in upon the track upon the assumption that there was no danger. Held, that such persons had the right to presume, in the absence of knowledge to the contrary, that the gatemen were properly discharging their duties; and that it was not negligent on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gatemen. The following cases tend to support the plaintiff's contention that the question of *Sherwood's* negligence was for the jury: *Tyler v. Railway Co.*, 137. Mass. 238; *Railway Co. v. Clough* (Ill.), 25 N. E. Rep'r, 664; *Pennsylvania Co. v. Stegmeier* (Ind.), 20 N. E. Rep'r, 843; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 27 Fed. Rep'r, 159; *State v. Railroad Co.*, 15 Atl. Rep'r, 36, 39; *Burns v. Rolling Mill Co.*, 65 Wis. 312, 315; 27 N. W. Rep'r, 43. See, also, *Shear. & R. Neg.*, § 466.

On the contrary, we are cited to a case in *Pennsylvania* where gates and a watchman had been kept at a crossing. The gates were lowered at the approach of trains. The gates were out of repair. Being open, the plaintiff drove a horse-cart across the track without stopping or looking or listening. The watchman displayed no signal and gave no warning. The court held this to be contributory negligence on his part and said, speaking through the chief justice: "I do not understand the law to be that, where a railroad company adopts safety gates or other appliances for the protection of the public, the public are thereby absolved from the duty of taking any care of themselves. The plaintiff was bound to do his part. He had no right to omit the ordinary precaution merely because the gates were up. Each party should be held to the exercise of due care. If the rule to stop, look and listen were observed, the accidents now so frequent could rarely occur, whether in town or country. It is as important in towns as in the country. It is sustained by competent au-

thority and founded on such excellent, common-sense reasons that we will neither depart from it, or allow it to be undermined by exceptions. It is a clear and certain rule of duty and a departure from it is more than evidence of negligence; it is negligence *per se*." *Greenwood v. Railroad Co. (Pa.)*, 17 Atl. Rep'r, 188.

The evidence on the part of the plaintiff tended to show that the watchman was inside the shanty or flag-house. The door of this house opens on the east, facing the railroad track. There are two small windows in it, one in the north and one in the south end, so that the flagman can see up and down the track both ways. It is claimed by the plaintiff that Sherwood was looking toward this south window and could see the flagman therein before he reached the track, while the defendant claims that he could not have seen him until his horse was on the track. Of course, if Sherwood saw the watchman inside of his house, where such flagman could plainly see an approaching train and the flagman gave no signal, it would be a more favorable circumstance to plaintiff, as bearing upon Sherwood's negligence, than if the flagman was apparently absent from his post and Sherwood could not see him at all. The only evidence as to whether Sherwood could have seen the flagman through this window comes from two witnesses. Gilman, for the plaintiff, says: "The windows on the north and south sides of the shanty are well toward the east and near the two corners. They are small windows. A person coming from the west, driving a street-car, could not see through those windows, to see who was in the shanty, until he got opposite. When they got opposite they would be right up by the track." Rooney, for the defendant, says: "The driver could have seen him [the watchman], if he was watching carefully for him, through the window that fronts Fulton street."

Under all the circumstances, I am satisfied that the court correctly submitted the question of Sherwood's negligence to the jury. He instructed them that "a railroad crossing is a place of danger, and is itself a warning to any one about to go upon it to be careful and vigilant to the extent of his opportunities. It was the duty of Sherwood in approaching the railroad track to use his senses of sight and hearing to ascertain whether a train was approaching, and, if the jury find he did not, then the plaintiff is not entitled to recover." That it was the duty of Sherwood to ex-

ercise due care whether or not the flagman was in sight, and if the flagman was found not to have been present to give warning, such act could be considered as bearing upon the negligence of both Sherwood and the defendant. "If the deceased, Sherwood, by the exercise of ordinary care and prudence, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so would amount to such negligence as would defeat plaintiff's right of action, unless you find that his attention at the time was directed to the flagman, and the flag-office, and that he had a right to rely on the position of the flagman, and absence of warning, as an assurance of safety. If the jury find the view of the track approaching from the south was obscured somewhat by lumber, etc., in Pierce's lumber-yard, so that a train could only be observed by extreme care and caution, and that Sherwood knew this, then it was the duty of Sherwood to use such extreme care and caution as was appropriate to the circumstances. This would be true in a case where there was no flagman; but the question of the extent to which the deceased had a right to rely upon the position of the flagman, and his failure to give warning, is a question for the jury. It is the duty of every car-driver, when approaching a railroad crossing with passengers in his car, where his view of an approaching train is somewhat obscured, to stop, and look and listen, to insure himself that a train is not approaching before he attempts to cross, unless the negligence of the duty of the company, through the absence of its flagman or his failure to give warning, was such a notice to Sherwood that it was safe to cross as would excuse an ordinarily prudent man from stopping, looking and listening."

"It was the duty of Sherwood, in approaching such crossing, to have his horse and car under control, so that he could respond quickly to the slightest intimation of danger; and if he approached the track, after he received such intimation, and thus contributed to the injury, then the plaintiff cannot recover. If the jury find that a person of ordinary care, driving the street-car, as Sherwood was, might, by exercising proper care and diligence, have ascertained that the cars were approaching from the south at the time of this accident, then the plaintiff cannot recover in this case, however negligent the railroad company may have been, and al-

though the flagman was not at his post to give warning. If the railroad company was negligent, \* \* \* and the flagman was negligent, and Sherwood was also so negligent as to in any manner contribute to the injury, then the plaintiff could not recover. To entitle the plaintiff to recover, he must establish that the death of Sherwood was caused by the negligence of the defendant. This, of course, requires a showing that Sherwood was not himself guilty of negligence which contributed to the injury. To constitute negligence contributing to the injury on the part of Sherwood, there must have been a failure on his part to observe and exercise ordinary care; and, if the plaintiff has shown that the deceased, Sherwood, used such care as men of ordinary prudence would have exercised under like circumstances, and placed as he was, then he was not guilty of contributory negligence. In determining whether the deceased, Sherwood, used due care, you have the right to take into account the obstructions to the south, their nature and extent, the manner in which Sherwood was driving, the fact of the defendant having maintained a flagman at the crossing, and the fact, if it be a fact, that this was known to Sherwood; and you have a right to take into account whether the deceased was watching for the flagman, the extent to which he had his car under control, the extent to which he looked out for trains; and you are then to say whether he used such care as men of ordinary prudence would have exercised under like circumstances, and, if he did use such care, he was not guilty of contributory negligence."

The defendant asked the court to instruct the jury, in substance, that the absence of the flagman from his post did not in the least excuse Sherwood from exercising his senses of sight and hearing to ascertain whether the train was approaching; and that, if the deceased, Sherwood, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so was such negligence as would prevent plaintiff's recovery. This was refused, and it will be seen that the court left it to the jury to determine whether, under the circumstances, Sherwood had a right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from such watchman as an assurance of safety; and they were instructed that, if an ordinarily prudent man

would have done the same as Sherwood did under the same circumstances, the plaintiff could recover. I find no errors in the charge on the subject of negligence. There were no material errors in receiving or rejecting testimony.

It is alleged that the court erred in his instructions as to damages. The evidence showed that the next of kin consisted of his mother, Fannie Sherwood, two brothers, Seth W. and Frank Sherwood, and two sisters, Ella and Marcella Sherwood. The deceased lived with his mother, as did his sister Ella, who was an invalid. Frank lived with his mother. The older son, Seth, had not been heard from in five years, at which time he was in Wisconsin. Mrs. Sherwood testified that deceased helped her from \$8 to \$10 per week. He also assisted her in her work about the house when he was off duty as car-driver. He was thirty years of age at the time of his death. She testified that his board, allowing him for his help about the house, was worth about \$2 per week. Frank worked at a restaurant for \$1 a day, and contributed some to the support of the family. Since the death of Cady, the deceased, Frank has contributed nearly his entire wages to the support of the family; before that about \$2 per week. The oldest daughter, Marcella, boarded and lodged at home, but contributed nothing to the support of the family. The mother testified that the deceased contributed \$2 per week toward the support of his invalid sister Ella. Ella was twenty-one, and Mrs. Sherwood fifty-four years of age when Cady died. The court instructed the jury: "If you find the plaintiff entitled to recover, he is entitled to recover damages to the extent of the pecuniary loss which the mother and next of kin of the deceased, Mr. Sherwood, have sustained by his death. This amount will be such an amount as the jury are able to say it is reasonably probable would have been contributed by the deceased to their support had he lived. The jury cannot go beyond the term of the expectancy of life of the deceased, which is shown by the tables to have been thirty-five and thirty-three one-hundredths years, and, in weighing the testimony as to the contributions which would have been likely to have been made to the mother of the deceased, the jury cannot extend these beyond the period of her expectancy of life, which is shown by the tables to have been eighteen and seventy-nine one-hundredths years. As to the testimony of contributions

to the sister, these cannot be considered, except for the period after the probable decease of the mother, and, under the testimony, such contributions are said to have been included in the sum which was contributed to the family. It is not for the court to intimate what amount of contributions the deceased would have contributed to the family, nor is the evidence of what he had in his life-time contributed conclusive upon this subject, but it is evidence which the jury have a right to consider for what it is reasonably worth, and it is for the jury to say what it is reasonably probable that the deceased would have contributed, both as to the extent and duration thereof, not exceeding the time stated as his expectancy of life, and not exceeding the amount shown to have been contributed in his life-time; and if you are able to fix the sum which he would have annually contributed, then I charge you that the plaintiff should recover only the present worth of that sum, as you may find it to be, not exceeding in amount \$10,000, the amount stated in the declaration."

The statutes giving damages in cases like the present are as follows: Howell Statutes, section 3391, subdivision 7: "Whenever the death of a person shall be caused by wrongful act, neglect or default of any railroad company or its agents, and the act, neglect or default is such as would (if death had not ensued) entitle the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the railroad corporation which would have been liable if death had not ensued shall be liable to an action on the case for damages, notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony." Id., § 3392, subd. 8: "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in such action shall be distributed to the persons, and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered; provided nothing herein contained shall affect any suit or proceedings heretofore commenced, and now pending in any of the courts of this state." We held in *Van Brunt v. Railway Co.* (Mich.),

44 N. W. Rep. 321, that under these statutes, none of the next of kin could recover, unless they showed a pecuniary injury on account of the person killed; and if, as in that case, the proofs showed no person pecuniarily injured by the death of plaintiff's intestate, there could be no recovery; that it evidently was not the intention of the legislature to make one rule of damages in the case of a person killed through the negligence of a railroad company, and another rule in the case of a person killed by some person or corporation other than a railroad company. See *Van Brunt v. Railway Co.* (Mich.), 44 N. W. Rep'r, 322, 323, and cases cited. Under this holding, damages in this case could only be recovered on account of the mother, and the sister Ella, as no pecuniary injury was shown to the others by Sherwood's death. The court, in effect, so limited it, and was also correct in allowing no damages to be computed on account of the sister until after the mother's death, as under the testimony, these contributions to the sister were included in the contributions to the family.

It is urged that the court erred in allowing the recovery of any damages on account of the sister Ella, because under the law of distribution of the personal property of intestates passed in 1889, and which was in force at the time the verdict was rendered, the whole of the personal estate of the son descended to the mother, and she would therefore be entitled to the whole of the damages. Pub. Acts, 1889, p. 193. But the distribution of the personal property of Sherwood's estate would we think be governed by the law in reference thereto existing at the time of his death, which provided that the property in such a case as this should descend, one-half to his mother, and the remainder in equal shares to his brothers and sisters. Pub. Acts 1883, p. 181. See, also, How. St., § 5847, subd. 6.

The counsel for defendant argue, further, that, if the personal estate descends under the law of 1883, section 3392 of Howell is invalid and inapplicable, because, by the latter statute, the jury is authorized to give such amount of damages as they deem fair and just to the persons who may be entitled to such damages when recovered. And this has been construed to mean that the jury may give such damages as have been sustained by the several persons who have suffered pecuniary loss. But, as the same statute also provides that the money so recovered shall be distributed to

the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, it is argued that the brothers and sisters are all put upon the same footing, whether any damages have been recovered on their account or not; and that in this case, if the other sister and the brothers should apply to the probate court for their share, such court could not refuse to order it turned over to them. They would thereby receive money, in effect, for damages which the statute would not permit to be recovered on their account, because they had suffered no pecuniary loss by their brother's death. There is a seeming contradiction or inconsistency in this statute under the construction given it in *Van Brunt v. Railway Co.*, supra, but, as so construed, it is identical in its provisions with section 8314, *Howell Statutes*, under which statute damages have been recovered, and affirmed by this court in a number of cases. And in *Hunn v. Railroad Co. (Mich.)*, 44 N. W. Rep'r, 506, the assessment was affirmed as proper of nominal damages only to the brother and sisters of Hunn, who were entitled to a share with the widow of the personal estate of the deceased under our laws of distribution of personal property. The same objection, with more elaboration, was made to a statute of New York, similar to ours, by Hoar, J., in *Richardson v. Railroad Co.*, 98 Mass. 85, 90, 91, but the case was not, however, decided upon that ground. What disposition is made of the money recovered, if the defendant is liable for it for pecuniary damage suffered by any of the next of kin through its negligence, does not concern the defendant. When a conflict arises under this statute as to the distribution of the money recovered as damages, it will then be competent and necessary for the courts to decide who are entitled to the fund. The damages are manifestly to be given in reference to the pecuniary injury resulting from the death to those persons who may be entitled to such damages when recovered. See § 8314, *How. Stat.*; *Van Brunt v. Railway Co. (Mich.)*, 44 N. W. Rep'r, 323.

It would seem that in this case the damages should have been given as they were under the charge of the court in reference to the pecuniary injury suffered by the mother and the sister Ella, and there also would seem to be no serious difficulty in the way of their obtaining it from the administrator. It is claimed that the verdict was excessive. With that we have nothing to do. But



if the jury found that Sherwood contributed \$7 a week to his mother, and \$2 per week to his sister, as they were warranted in doing from the proofs, considering the expectancy of life of the mother and son, the verdict cannot be said to have been excessive. The judgment is affirmed, with costs.\*

McGrath and Long, JJ., concurred with Morse, J.

Champlin, C. J., and Grant, J., dissent.

1. **Accidents at railroad crossings—whether traveler may rely upon flagman at crossing.**—Where a flagman is stationed at a crossing to give warning of approaching trains, travelers have a right to rely on his reasonable performance of his duty, and need not look and listen for a train before crossing the track, *Chicago, etc., R. Co. v. Clough*, 184 Ill. 586; 25 N. E. Rep'r, 664. Where the gates at a crossing are not lowered, and no bell or whistle is sounded by a train approaching at an unlawful rate of speed, the mere fact that the flagman signaled plaintiff not to cross does not free the railroad company from culpable negligence unless such signal was given in time for plaintiff, by the exercise of reasonable care, to have avoided the injury. *Ibid.*

2. **Ringing bell and blowing whistle.**—Although defendant was not required by statute to sound a whistle, if those in charge of the train saw plaintiff approaching, and about to go upon the track, and believed that he was unaware of the train's approach, they should have sounded the whistle, and taken every reasonable precaution to prevent the collision. *Piper v. Chicago, etc., R. Co.*, 77 Wis. 247; 46 N. W. Rep'r, 165.

An instruction that affirmative testimony, as that a bell was rung or a whistle was sounded, is entitled to more weight than negative testimony, as that such bell or whistle was not heard, is properly refused, as ignoring the fact that in weighing such testimony the credibility and means of knowledge of the witnesses should be considered. *Pence v. Chicago, etc., R. Co.*, 79 Iowa, 389; 44 N. W. Rep'r, 686. To same effect, *Missouri Pac. R. Co. v. Johnson*, 44 Kans. 660; 24 Pac. Rep'r, 1116.

3. **Running switch—injury to child on crossing—liability.**—Where the presence of a three-year-old child on a railroad track at a public street crossing is not attributable to the negligence of its parents, the railroad company is liable for injuries sustained by the child from being run over by a detached car while its employes were making a running switch without taking any precaution to avoid injuries to travelers on the crossing. *Louisville, etc., R. Co. v. Schmidt*, 126 Ind. 290; 26 N. E. Rep'r, 45.

4. **Backing train over crossing—negligence in giving signals—view obscured by passing train on first track.**—In an action by the father against a railroad company for the negligent killing of his seven-year-old daughter it appeared that deceased, with other little children, was returning from school along the usual street, which was crossed by defendant's tracks; that they waited for a freight train on the north track to pass, after which deceased started to cross, and was run over by a train backing up at the rate of seven miles an hour on the south track. The latter train had been hidden by the

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\* Reported in 49 N. W. Rep'r, 621; 85 Mich. 374.

first train, and there was no signal given, except by the engine, which was at the other end, a distance of three hundred feet. Held, that the court properly refused to direct a verdict for defendant. *Louisville, etc., R. Co. v. Rush*, 127 Ind. 545; 26 N. E. Rep'r, 1010.

5. Omission to have head-light burning — Liability. — The omission of a railroad company to have the head-light on its engine lighted at about dusk will not warrant a recovery for the death of one run over by the engine at a crossing, where the engine and cars, as well as the reflection of the lights from the car windows, were distinctly visible to persons near the crossing. *Daniels v. Staten Island Rapid Transit R. Co.*, 125 N. Y. 407; 26 N. E. Rep'r, 466.

PEOPLE V. WAGNER ET AL. SAME V. BARRIE ET AL. SAME V. WITTELSBERGER ET AL.

(Supreme Court of Michigan, July 23, 1891.)

1. MUNICIPAL CORPORATIONS. POLICE POWER. TITLE OF ORDINANCES. The Constitution of Michigan, relating to the title of laws, does not apply to city ordinances; and an ordinance of the city of Detroit, entitled "An ordinance relative to the manufacture and selling of bread," is not objectionable on the ground that matters contained within the body of the ordinance are not within the title.

2. ORDINANCE REGULATING THE MANUFACTURE AND SALE OF BREAD. VALIDITY. An ordinance of the city of Detroit, which provides that bread shall be manufactured into loaves of one, two and four pounds (and no other), and prohibits the sale of bread deficient in weight, does not authorize the seizure of short-weight bread, and the prohibition is not a taking of private property without compensation.

3. CHARTER AUTHORITY. The provision of the charter of Detroit empowering the common council to direct and regulate the weight and size of loaves of bread, and the inspection thereof, confers ample authority for passing the ordinance.

4. REASONABLENESS. Such a regulation is within the police power of the state, and the ordinance is reasonable and valid.

CERTIORARI to recorder's court of Detroit. The defendants in each case were jointly convicted of a violation of an ordinance and the three cases came to the supreme court on a writ of *certiorari* by stipulation, on one record. Writ dismissed.

*William Look* and *H. F. Chipman* for petitioners. *Chas. W. Casgrain*, city attorney for the people.

McGRATH, J. This case comes from the recorder's court of

the city of Detroit by writ of *certiorari*, defendants having been convicted of a violation of a city ordinance. By stipulation, the cases come up on one record. Defendants are bakers and are charged with making for sale, selling and offering for sale, bread that was deficient in weight under the ordinance. The ordinance is entitled "An ordinance relative to the manufacture and selling of bread." The ordinance provides that it shall not be lawful for any person to carry on the trade or business of baker, without first having obtained from the common council a permit for that purpose. It next prescribes how the permit shall be obtained, and that the clerk shall keep a record of the permits granted. It then concludes as follows: "§ 4. All bread of every description, manufactured by the bakers of this city for sale, shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds and four pounds (and no other) avoirdupois weight; and no baker shall make for sale or shall sell or expose for sale, any bread that shall be deficient in weight, according to the requisitions prescribed in the preceding section of this chapter; provided, always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing, or causing to be weighed, in his presence, within eight hours after the same shall have been baked, sold, or exposed for sale; and provided, further, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold or exposed for sale more than eight hours, as aforesaid, the burden of proof in respect to the time when the same shall have been baked, sold or exposed for sale shall devolve upon the defendant or baker of such bread. § 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread; and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all reasonable hours, to enter into and inspect and examine every baker's shop, storehouse or other building where any bread is or shall be baked, stored or deposited or offered for sale, and to inspect and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weighing the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and, if the said inspector shall find any bread not con-

formable to the directions herein contained, or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law.

“§ 6. No person or persons shall obstruct, or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this act, either by refusing him or delaying his entrance or admission into any of the places above named, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance, or any part of it, shall be impeded or obstructed. § 7. Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed \$50 and the cost of prosecution; and the offender may be imprisoned in the Detroit house of correction until the payment thereof; provided, always, that the term of imprisonment shall not exceed the period of six months.”

The defendants insist (1) that matters contained within the body of the ordinance are not within its title; (2) that by the ordinance private property is taken without compensation; (3) that the ordinance abridges the right of the respondents to manufacture loaves of bread of such size or weight as they may deem most salable; (4) that it curtails defendants' business, and places a limitation upon the capacity of respondents to carry on a lawful business; (5) that the ordinance is not within the police powers of the state.

There is no force in the first objection, as the provisions of the ordinance are clearly within the scope of its title. It has been held that the constitutional provisions relating to the title of laws passed by the legislature do not apply to ordinances enacted by a common council of a city. *People v. Hanrahan*, 75 Mich. 611-615; 42 N. W. Rep'r, 1124.

The ordinance does not provide for the taking, seizing or destruction of short-weight bread. It does prohibit the sale of bread which is deficient in weight. The same objection may be made to ordinances prohibiting the importation of infected rags, or the sale of diseased cattle or of unsound beef, or of decayed vegetables, or of illuminating oils which are below the standard test, or of watered milk. In *Wheeler v. Russell*, 17 Mass. 257, it was held that no recovery could be had for the price and value of shingles which were not of the statutory dimensions. In *Eaton*

v. Keegan, 114 Mass. 433, it was held that, in view of the statute requiring oats and meal to be sold by the bushel, no recovery could be had for the price and value of those articles when sold by the bag.

It is claimed by defendants that, in order to get a pound of baked bread, they are compelled to put into the oven more than a pound of dough, and that the process of baking reduces the weight, and, when asked what it is that evaporates, they reply, "water." But they say the process of baking is not always uniform. The oven may be too hot. In such case, the bread crusts or skins quickly, retaining the moisture. And again, it may be too cold; in which case the bread dries up rather than bakes, and in order to insure a pound loaf, the latter contingency must be provided against, and the weight of the dough must always be regulated accordingly. That fermentation is not always regular, and, when it reaches a certain point, the dough must be put into the oven, without reference to the condition of the oven. That the cutting up of the dough, the weighing of it, and its transfer to the oven is necessarily hurried, and the scales are liable to become clogged or affected by dust. Notwithstanding all the difficulties suggested by respondents, the evidence shows that the bread inspector has been diligent in the performance of his duties; had frequently visited the several bakeries of defendants, and but one of these defendants has before this time been complained of, and that was fifteen years ago; and it is admitted by defendants, not only that the ordinance may be complied with, but that the short-weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance; and, after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business, and made their bread in accordance with the provisions of the ordinance. Again, it is claimed that a barrel of flour will make two hundred and fifty loaves of bread, and that it is impossible to distribute an ordinary advance in price of flour over this product; in other words, that the price of a loaf of bread cannot be advanced a fraction of a cent. This difficulty affects the retail dealer more than the wholesaler. It has to be met in the sale of a pound of nails, of a dozen buttons, or of a paper of needles, as well as in the sale of a loaf of bread. The ordinance does not attempt to

regulate the price of the commodity. That is not necessarily fixed with reference to flour at its cheapest price, so that, until the price of flour is reduced until it reaches a point where the reduction may be distributed, the dealer gets the advantage of the reduction, and when it advances above the standard the consumer gets the advantage, until a point is reached where the advance may be added. This fluctuation and these results are ordinary incidents of trade. The state may institute any reasonable preventive remedy when the frequency of the frauds, or the difficulty experienced by individuals in circumventing them, is so great that no other means will prove efficacious. *Tied. Lim.*, § 89, p. 208. Bread is an article of general consumption. It is usually sold by the loaf, and the individual consumer, in the majority of cases, buys by the single loaf.

Each transaction involves but a few pennies, although the number of individual transactions in a large city reaches each day into the thousands, and the opportunities for fraud are frequent. It would be practically impossible to prevent fraud in the sale of short-weight loaves, if the matter was left to the ordinary legal remedy afforded the individual consumer for fraud or deceit. The amount involved would not justify a resort to litigation. Sales are invariably made in loaves of the size of one, two or four-pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package. It does not prohibit the sale of bread by weight if it overruns, as it is claimed that it sometimes does, nor does it prohibit the exaction of an increased price by reason of the additional weight. It does not prohibit the sale of a half or a quarter or any other fraction of a loaf. Our statutes not only fix the number of pounds of each of the various commodities that shall constitute a bushel, but they also provide that a "box" or "basket" of peaches shall contain one-third of a bushel, and they fix the size of a "barrel" of fruit, roots or vegetables, and they may, with equal propriety, fix the weight of a package or loaf of bread.

The police power of a state is not confined to regulations looking to the preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional

objection. Tied. Lim., p. 208, § 89. The charter of the city of Detroit empowers the common council "to direct and regulate the weight and quantity of bread, the size of the loaf, and the inspecting thereof." The ordinance is clearly within this provision, and it cannot, under the decision in *People v. Armstrong*, 73 Mich. 293; 41 N. W. Rep'r, 275, be subjected to the test of reasonableness. The convictions are affirmed, and the writ dismissed. The other justices concurred.\*

**Municipal corporations — ordinance regulating the manufacture and sale of bread.** — In *Mobile v. Yuille*, 3 Ala. 137, an ordinance of the city of Mobile fixing the weight and price of bread was held to be valid. The comments of Judge Cooley upon this decision will be found in 2 Am. R. R. & Corp. Rep. 587.

### PRESBY V. GRAND TRUNK RY. CO.

(Supreme Court of New Hampshire, July 31, 1891.)

1. **RAILROAD COMPANIES. NEGLIGENCE. BLOWING OFF STEAM.** In an action against a railroad company for injuries caused by plaintiff's horse being frightened by defendant's locomotive blowing off steam, the evidence showed that the horse was frightened by the escaping steam; that no notice was given of the approaching train by ringing the bell, and that the view of the train was obstructed by box-cars, one of which was standing in the limits of the highway. Held, sufficient to sustain a verdict for plaintiff.

2. **AUTOMATIC VALVE.** The fact that the escape of steam from defendant's locomotive was regulated by an automatic valve is no justification for allowing steam to escape, and it was a question of fact for the jury whether defendant was guilty of negligence in permitting steam to escape.

3. **EVIDENCE.** It was proper to admit evidence tending to show that engines standing at the station frequently blew off steam and frightened horses, and that cars were frequently left on the side track in such a position as to obstruct the view of a train at the station to a traveler on the highway.

4. **PROOF OF CHANGES AFTER THE ACCIDENT.** Evidence as to filling up the depression and as to a change of practice in regard to leaving cars at the crossing after the accident to the plaintiff was competent as tending to show an admission that these changes ought to have been made before.

**EXCEPTIONS** from Coos county, before Justice I. W. Smith. Action by John Presby against the Grand Trunk railroad to recover damages for injuries caused by plaintiff's horse being frightened by defendant's locomotive blowing off steam. Judgment for plaintiff. Defendant excepts. Exceptions overruled.

\* Reported in 49 N. W. Rep'r, 609.

*James W. Remick and Parsons & Madden* for plaintiff.  
*Ossian Ray, Drew & Jordan and A. A. Strout* for defendant.

CLARK, J. To maintain his action, the plaintiff must show that his injury was caused by the defendant's want of ordinary care. He complains that the defendant was negligent in blowing off steam, and thereby frightening his horse; in not giving notice of the approach of the train by ringing the bell for a distance of eighty rods before reaching the crossing; in leaving box-cars on the side track, one of which was within the limits of the highway, in such a position that the view of the train was obscured; in not having a flagman or gates at the crossing; in placing a hand-car and semaphore post in the highway; and in not extending the planking at the highway crossing over the depression at the joint of the rails, and thus leaving the crossing of insufficient width. Having produced evidence tending to establish the matters complained of, the questions of the plaintiff's care, and of the defendant's negligence, were properly submitted to the jury.

The motion that a verdict be ordered for the defendant was based upon the claim that the escape of the steam from the engine, being regulated by an automatic valve such as is generally used by railroad companies, was involuntary, and could not be controlled by the defendant's servants, and, therefore, the defendant was not chargeable with negligence on account of the noise of the escaping steam, and that the other alleged negligent acts and omissions were too remote and immaterial. The operation of the automatic pop-valve was simply to allow the steam to escape whenever the pressure exceeded one hundred and thirty-five pounds. It did not in any way affect the quantity of steam generated. The amount of steam produced was under the control of the defendant's servants in charge of the engine, and the pressure upon the pop-valve depended upon the management of the fire and the condition of the engine as to working steam or standing still. The evidence was that valves of a higher pressure are sometimes used, and it could not be said, as matter of law, that the valve upon the defendant's engine was suitable. It was a question of fact for the jury to determine whether, under the circumstances, the defendant was guilty of negligence in causing the fright of the plaintiff's horse by the escaping steam. And in de-



termining this question it was material to inquire what precautions the defendant used to warn travelers upon the highway of the approach of the train, and what opportunity the plaintiff had of knowing that the engine was standing near the crossing; and for this purpose the evidence whether the bell was rung, whether the box-cars obstructed the view of the train and whether any warning was given of the presence of the engine at the crossing, was competent and material. So, also, the evidence as to the location of the hand-car and semaphore post, and the depression in the road-bed within the limits of the highway, and the width of the planking at the crossing, was competent upon the question whether the defendant was exercising ordinary care to guard against injury to travelers whose horses might be frightened by the locomotive and the noise of escaping steam; and upon the inquiry as to the cause of the accident to the plaintiff. *Gordon v. Railroad*, 58 N. H. 396.

The testimony of Hinman, the highway surveyor, that he called the attention of the defendant's station agent to the depression between the ties at the end of the planking on the crossing; that it was nine inches or more from the surface of the ground to the top of the rail — was competent to show that the defendant had notice of the condition of the crossing at that point before the accident. Upon similar ground, the testimony of Pattee and others, that engines standing at the station frequently blew off steam and frightened horses, was admissible to show the defendant's knowledge of that source of danger to travelers on the highway crossing, which was a material fact to be considered in determining whether the defendant exercised reasonable care to prevent injury from that cause. The evidence as to the practice of leaving cars on the side track in such a position as to obstruct the view of a train at the station to a traveler on the highway, as to ringing the bell, and blowing off steam, was admissible, as tending to show what was done at the time of the accident to the plaintiff. *Hall v. Brown*, 58 N. H. 93; *Parkinson v. Railroad Co.*, 61 N. H. 416. Although the pop-valve was automatic, the quantity of steam was controlled by regulating the fire, and the evidence of blowing off steam tended to show that the pressure usually carried at that point was such that steam was liable to escape through the valve while the train was standing at the

station. The evidence as to filling up the depression, and the change in the matter of leaving hand-cars at the crossing after the accident to the plaintiff, was not legally objectionable. It tended to show an admission that the changes ought to have been made before the accident. *Martin v. Towle*, 59 N. H. 32. Judgment on the verdict.\*

Smith, J., did not sit. The others concurred.

1. *Railroad companies — frightening horses — blowing whistle.*— Plaintiff, while on one of the streets of a village, was injured by a runaway team which had become frightened by the blowing of a whistle on one of the defendant's engines. It was held that whether it was negligence to blow the whistle under the circumstances of the case was a question properly left to the jury, and a verdict for the plaintiff was affirmed. *Dugan v. St. Paul, etc., R. Co.*, 43 Minn. 414; 45 N. W. Rep'r, 851.

2. *Horses frightened by noise of train overhead.*—A railroad company is not liable for injuries resulting from the frightening of horses by the noise of its trains, where they are operated in a lawful manner, and without negligence or malice. *Ryan v. Pennsylvania R. Co.*, 182 Penn. St. 804; 19 Atl. Rep'r, 81.

3. *Electric cars — horses frightened thereby — negligence of company.*— In an action against an electric railway company, it appeared that plaintiff, while driving along the avenue on which was the car line, saw a train coming around a bend about three hundred and fifty or four hundred feet away; that he motioned for it to stop, and got out, and took his horse by the head. The cars were then about half way to him, and slowing up; and the horse exhibiting signs of fear, he led it across the sidewalk into an open field. The horse dragged him about the field, and finally turned, and dragged him into the street, where he fell, and was injured, and the horse ran away. The cars were running at ordinary speed, the gong was sounded as they approached the bend, and they stopped before reaching plaintiff. Held, that there was no negligence on defendant's part, its servants not being obliged to immediately stop the cars. *Cornell v. Detroit Electric R. Co.*, 83 Mich. 495; 46 N. W. Rep'r, 791.

4. *Contributory negligence—driving young horse near cars to test him.*— Plaintiff in above case having taken his horse, which was young, and unused to the place or cars, to the point in question, for the purpose of testing him, to see how he would act, was guilty of contributory negligence. *Id.*

5. *Team frightened by grip-car ringing bell at crossing—negligence.* Where a team of horses take fright at a traction-car, and run away, injuring their driver, the fact that the gripman stopped the car and rang the bell at a street crossing near the team does not constitute negligence, it being his duty to stop and ring at such crossings. *Steiner v. Philadelphia Traction Co.*, 184 Penn. St. 199; 19 Atl. Rep'r, 491. See, also, *People's Passenger Ry. Co. v. Hazel*, 123 Penn. St. 96; 18 Atl. Rep'r, 1116.

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\* Reported in 22 Atl. Rep'r, 534.

## POWERS V. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts, May 22, 1891.)

1. MUNICIPAL CORPORATIONS. PERSONAL INJURY. BARRIER ABOUT EXCAVATION WHEN A "DEFECT." Plaintiff was a conductor of an open horse-car, and while standing on the running-board thereof, collecting fares, was injured by a barrier planted in the street by the city authorities, close to the rails, as a guard, where the street had caved in. Held, proper to charge that, if the barrier was reasonably necessary to protect the public, and its position was indicated by sufficient lights, it was not a defect for which the city would be liable, no matter how near it came to the track; but that if it was not necessary, or was carried too far into the street, or was so constructed as to be a danger rather than a safeguard to public travel, or if the danger had been ended long enough to have reasonably enabled the barrier to be removed, then it was a defect.

2. CONTRIBUTORY NEGLIGENCE. KNOWLEDGE OF DEFECT. Where the conductor knew, in a general way, that there were obstructions in the street through which the car passed, but did not know how near to the car nor how dangerous they were, and at the time of his injury was engaged in collecting fares, the question of negligence was for the jury.

3. ABSENCE OF LIGHTS. INSTRUCTION. Where the accident happened a little after sunset in September, and there was testimony that it was misty at the time, and two witnesses testified that they did not notice any lights on the barrier, there is evidence to justify a charge that if lights were necessary, and there were none, the absence of them would be one of the elements in determining whether the barrier was a defect or not.

**E**XCEPTIONS from superior court, Suffolk county, Hamilton B. Staples, judge. Action by J. M. Powers against the city of Boston for damages for personal injuries alleged to have been sustained in consequence of a defect in the public highway. Trial to a jury, verdict and judgment for the plaintiff, and the defendant appeals, alleging various exceptions to the charge.

*Allen, Long & Hemenway* and *Chas. S. Knowles* for plaintiff.  
*W. S. B. Hopkins, Chas. T. Davis, Jas. D. Colt* and *Frank B. Smith* for appellant.

HOLMES, J. This is an action to recover damages for personal injuries alleged to have been caused by a defect in a highway. The plaintiff was a conductor of a horse-car, and at the time of the accident was standing on the running-board of an open car, collecting fares, when he was knocked off and injured by being carried against a post planted in the highway within two inches

of the edge of the running-board. The post was part of a barrier which had been put up as a guard where the street had caved in because of an excavation for a new building at the corner of Court street and Washington street.

On the question whether the barrier was a defect, the jury were instructed, in substance, that if the barrier as it stood was reasonably necessary to protect the public at the time of the accident, and if its position was indicated by sufficient lights, it was not a defect, no matter how near it came to the railroad track; but that if it was not necessary, if it was carried too far into the street, if it was constructed so as to be a danger to public travel rather than a safeguard, the jury might find it to be a defect; or, if the danger had been ended long enough reasonably to have enabled the posts to be removed, then it was a defect. These instructions are not much questioned as abstract propositions and, in our opinion, they were correct. It is true that, under the circumstances supposed, the barrier might not be a defect as toward people traveling on foot or in carriages, and that it might be one relatively to the horse-cars only by reason of its nearness to the track and their inability to turn out. But it is not necessary that a matter complained of should endanger all modes of public travel in order to be a defect. It is enough that it makes any mode dangerous which the public have a right to use. The ground is not that horse-cars have greater rights than the public at large, but that travel by means of the horse-cars is one of the rights of the public at large. See *Gregory v. Adams*, 14 Gray, 242, 247; *Arey v. City of Newton*, 148 Mass. 598; 20 N. E. Rep'r, 327.

It is objected, however, that the instructions given allowed the jury to find that there had been such a change as to make it proper to remove the barrier, whereas, in fact, there was no such evidence. The question turns on the meaning of a witness, the inspector of buildings, in testifying that on Saturday morning the danger from the caving in had ceased (the accident having happened Saturday evening). It was left to the jury to say whether he meant that the danger to the public had ceased because the posts had been put in as a protection against it, or because the danger of a further caving in of the street was over, so that the barrier was no longer necessary. Whatever we might have thought if all the language used by this witness had occurred in

a written deposition, we cannot say that his words may not have admitted of two interpretations by those who heard them, and, therefore, we find no error here.

An exception is taken to leaving the question of the plaintiff's negligence to the jury. So far as the ruling requested rested upon the plaintiff's knowledge, it is to be observed that, while he admitted that he had a general idea that there were some obstructions there, he said that he did not know that they were as near to the car or as dangerous as they were. No doubt, if a man voluntarily runs into a danger which he fully appreciates, generally speaking he cannot recover for it, and it is rather a question of words than of substance whether he shall be called negligent or shall be said to have taken the risk. *Miner v. Railroad Co.*, 26 N. E. Rep'r, 994 (March, 1891). But a man does not take the risk of every danger which may arise from certain causes, merely because in a general way he is aware of the existence of those causes. *Thomas v. Telegraph Co.*, 100 Mass. 156, 158; *Barton v. Springfield*, 110 Mass. 131; *Dewire v. Bailey*, 131 Mass. 169; *Lawless v. Railroad Co.*, 136 Mass. 1, 5; *Ferren v. Railroad Co.*, 143 Mass. 197, 199; 9 N. E. Rep'r, 603; *Kelly v. Blackstone*, 147 Mass. 448, 451; 18 N. E. Rep'r, 217.

So far as the request for a ruling that the plaintiff was negligent was put upon the ground that he was standing on the running-board and allowed his person to project beyond the outer edge of the board, there can be no doubt, we think, that the question would be left to the jury in an action against the railroad company. *Meesel v. Railroad Co.*, 8 Allen, 234; *Fleck v. Railway Co.*, 134 Mass. 480; *Railway Co. v. Lee*, 50 N. J. Law, 435; *Geitz v. Railway Co.*, 72 Wis. 307; 39 N. W. Rep'r, 866; *Dahlberg v. Railway Co.*, 32 Minn. 404; 21 N. W. Rep'r, 545; *Dickinson v. Railway Co.*, 53 Mich. 43; 18 N. W. Rep'r, 553; *Railway Co. v. Walling*, 97 Penn. St. 55; *Railway Co. v. Gallagher*, 108 Penn. St. 524, 528. It is true that in such an action the plaintiff has the advantage that the defendant invited the conduct which it now alleges to have been negligent, but the reasoning of the cases is not wholly dependent upon this fact and the same conclusion has been reached in actions against third persons in cases of collision. *Spofford v. Harlow*, 3 Allen, 176; *Connolly v. Ice Co.*, 114 N. Y. 104; 21 N. E. Rep'r, 101. There

are many things to be considered in deciding upon the character of the plaintiff's conduct, and we cannot say that it seems to us so plainly negligent that the question should have been taken from the jury.

The only other point which is argued for the defendant is that the judge sent the case to the jury in such a way that they may have found for the plaintiff on the ground that, although the barrier necessarily was placed and left where it was, it was not lighted, and a light was necessary at the time of the accident, whereas, it is said, there is no evidence that it was dark, or that there were no lights. But there was some evidence for the plaintiff on both points. The accident happened at or a little after sunset on September 7, and there was testimony that it was misty. The plaintiff and a passenger testified that they did not notice any lights. *Johanson v. Railroad*, 26 N. E. Rep'r, 426 (January, 1891). Without considering more nicely what would constitute a *prima facie* cause entitling the plaintiff to go to the jury, we are of opinion that a new trial must be denied, and we reach the matter the more readily in view of the fact that the defendant did not ask a ruling that there was no evidence that the barrier was not lighted, and that the exception to the charge did not call attention of the judge or opposing counsel to the points now relied upon, except in a very indirect way.

Exceptions overruled.\*

#### MUNICIPAL CORPORATIONS — DEFECTIVE STREETS — PERSONAL INJURY CASES.

1. *Liability generally for defects in streets and sidewalks.*— Where the charter imposes the duty upon a city to keep its streets and highways in repair, and it neglects to do so, and one is injured by reason thereof, it is liable for the damages suffered. *Farquar v. City of Roseburg*, 18 Ore. 271; 22 Pac. Rep'r, 1103. To the same effect are *District of Columbia v. Woodbury*, 188 U. S. 450; 10 Sup. Ct. Rep'r, 990; *City of Sherman v. Williams*, 77 Tex. 310; 14 S. W. Rep'r, 130; *New Albany v. McCulloch*, 127 Ind. 500; 26 N. E. Rep'r, 1074. Where the general statutes impose such liability it is immaterial that the charter is silent on the subject. *Campbell v. Kalamazoo*, 80 Mich. 655; 45 N. W. Rep'r, 652.

Where the charter of a village makes it a highway district of a neighboring town, and provides that the highway taxes shall be paid to the treasurer to be expended in maintaining streets, which shall be under the charge of a commissioner appointed by the trustees, such trustees and commissioners are not the agents of the village in the premises, but are public officers, and the village

\* Reported in 27 N. E. Rep'r, 996.

is not liable for their negligence. *Bates v. Rutland*, 62 Vt. 178; 20 Atl. Rep'r, 278. To the same effect, *Quinlan v. Manistique*, 85 Mich. 23; 48 N. W. Rep'r, 172.

A municipal corporation being authorized by Revised Statutes of Indiana, 1881, sections 8163, 8164, 8165, to keep in repair its streets and sidewalks, by assessing the expenses therefor upon the abutting land-owners, an answer alleging that, for a month or more before the injuries were received, there were no funds in the city treasury available to make the needed repairs, and that the city was, and for a long time had been, indebted to the full extent of the constitutional limitation (Const. Ind., art. 18, § 1), shows no defense, and a demurrer thereto was properly sustained. *New Albany v. McCulloch*, 127 Ind. 500; 26 N. E. Rep'r, 1074.

Revised Statutes of Indiana, 1881, section 8161, having given to the common councils of cities exclusive control of streets and bridges therein, the fact that the county built a bridge within a city, and contracted for its repair, and employed a superintendent to see that the work was properly done, does not make the county liable to one who, while crossing the bridge at night, falls into a hole made by the contractor, and by him negligently left unguarded. *Spicer v. Board of Commissioners*, 126 Ind. 369; 26 N. E. Rep'r, 58.

2. *Duty of city generally in regard to keeping its streets in a safe condition.*—A city is required to use all reasonable care and supervision to keep its streets and sidewalks in a reasonably safe condition for travel in the ordinary modes of travel; and, if it fail to do so, it is liable for injuries sustained in consequence of such failure, provided the party injured was exercising reasonable care. *City of Lincoln v. Smith*, 28 Neb. 762; 45 N. W. Rep'r, 41. The care and diligence required of a city in such cases is not affected or varied by the number of miles of sidewalk therein, and the fact that a defect in a sidewalk is concealed by recently fallen snow does not release the city from liability. *Id.*

Before a city can be made liable for a defective street it must have had notice, either actual or constructive, of the defect, and reasonable time and opportunity to repair it. *Fuller v. City of Jackson*, 82 Mich. 480; 46 N. W. Rep'r, 721.

Where a city opens a sidewalk to public travel it is bound to keep every part of it in repair. *Roe v. City of Kansas*, 100 Mo. 190; 13 S. W. Rep'r, 404.

3. *Negligence in particular cases. Abrupt descent in sidewalk.*—Where the evidence shows that there was an abrupt descent in the grade of the sidewalk, variously estimated by the witnesses at from nine to fifteen inches, it was properly left to the jury to say whether this constituted a dangerous sidewalk, so that it was negligence on the part of the borough authorities to permit it to remain in that condition. *Readdy v. Borough of Shamokin*, 136 Penn. St. 98; 20 Atl. Rep'r, 896.

*Hydrant in sidewalk.*—A city is liable for injuries received by one, through no fault of his, in stumbling over a hydrant owned by a private company, which the city has allowed to be maintained on the sidewalk in a position dangerous to travelers. *King v. Oshkosh*, 75 Wis. 517; 44 N. W. Rep'r, 745.

*Overflow of sidewalk from obstructed gutter—absence of lights or guards.*—In an action against a village for personal injuries occasioned by plaintiff's overstepping, in the dark, the sidewalk, which was covered with water, and

falling into the gutter, it appeared that the street commissioner had on that day cleaned out the gutter, which was filled with ice and snow, but had failed to remove the obstruction which prevented the water from flowing into the sewer, and that there were no lights or guards at the place. Held, that the evidence tended to establish negligence on the part of defendant. *Bly v. Whitehall*, 120 N. Y. 506; 24 N. E. Rep'r, 948.

*Abrupt termination of sidewalk—absence of light or guards.*—In an action against a city for personal injuries, a petition which alleges that the sidewalk was twelve feet wide, but that where it crossed a ditch its breadth was reduced to three feet, and that plaintiff, without knowledge of this narrow place, walked into the ditch in the dark, there being no protection, lights or danger signals, and was injured, states a good cause of action. *Portland v. Taylor*, 125 Ind. 522; 25 N. E. Rep'r, 459. To same effect, *Shiffy v. Village of Au Sable*, 85 Mich. 280; 48 N. W. Rep'r, 584.

*Depressed roadway—frightened horse—running vehicle upon sides.*—A city is not liable to a person who, while driving on a street eighty-four feet wide, the center forty feet of which are twelve or eighteen inches lower than the twenty-two feet on each side, is thrown from his wagon because of his horse shying and making the wheels strike one of the elevated sides. *Johnson v. Philadelphia*, 139 Penn. St. 646; 21 Atl. Rep'r, 816.

*Rubbish deposited by overflow of defective culvert.*—Where it appears that a horse's leg was broken by stepping on a brick washed into the street by the overflow from a defective culvert, it is error to instruct that defendant is not liable, for the reason that such an injury could not have been foreseen and apprehended as a result of the insufficient capacity or lack of repair of the culvert. *Hazzard v. Council Bluffs*, 79 Iowa, 106; 44 N. W. Rep'r, 219.

*Overflowed highway—driving into hole concealed by the water.*—In an action against the town for the death of plaintiff's intestate, it appeared that she was riding as a stage passenger in the buggy of the mail carrier on his first trip for the season, and was thrown out and drowned by the upsetting of the buggy caused by a hole in the road, which was submerged by an overflow from a neighboring creek; that though the morning was stormy, and the water rising, the road was to all appearances safe, and the bridge, which they were carefully approaching, was all right. Held, that the evidence sustained a general verdict for the plaintiff, and a special verdict that the driver was not guilty of negligence. *Wiltse v. Town of Tilden*, 77 Wis. 152; 46 N. W. Rep'r, 234. It was proper to instruct the jury that if the condition of the highway at the time of the accident, in view of the previous known defects, and the nature of the creek, might reasonably have been anticipated by the authorities, it was their duty to either close the road until repaired, or provide a means of warning travelers of its dangerous condition. *Id.*

*Stairway in sidewalk.*—A stairway in a sidewalk leading to a cellar, which is protected by a railing on two sides and is open on another, is not necessarily a defect in the walk, and it is error so to instruct the jury. *City of Franklin v. Harter*, 127 Ind. 446; 26 N. E. Rep'r, 882.

4. *Defects caused by ice and snow.*—When the city authorities fail to clean out a gutter which they know to be obstructed, and, in consequence, the water from melting snow flows upon the sidewalk and freezes there, the city is liable to a person injured by slipping on the ice thus formed. *Gaylord v.*



New Britain, 58 Conn. 398; 20 Atl. Rep'r, 365. To the same effect, *Giltzie v. Lockport*, 122 N. Y. 408; 25 N. E. Rep'r, 337.

The liability of municipal corporations for defects, or dangerous condition of the streets and sidewalks, caused by snow and ice, is considered in note to *Henkes v. Minneapolis*, 2 Am. R. R. & Corp. Rep. 211.

**5. Sidewalk outside of line of highway — liability for defect therein.**— A municipality which causes a sidewalk to be built, or assumes control of it, is bound to keep it in repair, although it may not be within the line of a public street. *O'Neill v. Village of West Branch*, 81 Mich. 544; 45 N. W. Rep'r, 1023.

**6. Street laid out but abandoned — defects therein.**—In an action for injuries from a defective highway, it appeared that the place where the accident occurred in defendant village had been laid out as a street eighteen years before, but that it had never been opened and worked as a street, and that eleven years before a fence was built across it, and that from that time it began to be dug away and the excavation was continued in some places to the depth of fifty feet below the surface. During all that time it had been impassable for teams. Held that, not having been opened and worked within six years after it was laid out, it ceased to be a road for any purpose whatever under Laws of New York, 1861, chapter 811, and that defendant owed plaintiff no duty to keep it in repair. *Hovey v. Village of Haverstraw*, 124 N. Y. 273; 26 N. E. Rep'r, 532.

**7. New bridge substituted for old one taken by railroad—defects therein.**—Where a public road crossing a creek is taken for a railroad, and the railroad company, thereupon, builds a bridge across the creek as a substitute for such road, and the bridge is accepted as such by the county commissioners, it becomes the duty of the township authorities to keep the approach to such bridge in safe condition. *Dalton v. Upper Tyrone*, 137 Penn. St. 18; 20 Atl. Rep'r, 637. Whether the bridge was built and accepted as a substitute for the former road is, in an action for injuries caused by unsafe condition of its approaches, a question for the jury. *Id.*

**8. Defect outside of traveled way — liability.**—Where a culvert or bridge covered with gravel had faced abutments extending beyond and outside of the rails which marked the traveled part, the town is not liable to a traveler who, to aid his servant, who has fallen into the water, knowingly passes beyond the traveled part at a point where the rails are down, and while using due care himself falls from the bridge, the town in such case not being bound to repair beyond the traveled way, and the absence of the rails not contributing to the injury. *Harwood v. Oakham*, 152 Mass. 431; 25 N. E. Rep'r, 625.

**9. Contributory negligence. Blindness of plaintiff.**—In an action for injuries caused by falling into a cellar-way in defendant's sidewalk, alleged to have been negligently left open, the fact that plaintiff was blind does not authorize the conclusion that he was guilty of contributory negligence, against an allegation in the complaint that he was free from fault. *City of Franklin v. Harter*, 127 Ind. 446; 26 N. W. Rep'r, 382.

**Familiarity with street in which the defect exists — imperfect sight.**—Where plaintiff had crossed the bridge safely several times on the day of the accident and he testified that his eye-sight was not good, that it was dark when the accident occurred, and that he had never seen the hole which constituted the de-

fect complained of, it is proper to leave the question of contributory negligence to the jury. *City of Sherman v. Nairey*, 77 Tex. 291; 13 S. W. Rep'r, 1028.

*Breaking through bridge—unusual load.*—In an action against a county for an injury to plaintiff's team and threshing outfit, caused by the breaking of a bridge while attempting to drive across, it is for the jury to determine whether the use which plaintiff was making of the bridge was unusual and extraordinary, and such as the county was not bound to anticipate; and it is error for the court to decide this question, and to direct a verdict in the county's favor. *Tordy v. Marshall County*, 80 Iowa, 405; 45 N. W. Rep'r, 1042.

*Failure to observe defect in sidewalk.*—Plaintiff, traversing a sidewalk in the evening when it was still light enough to recognize acquaintances across the street, struck her foot against the planks of a street crossing, which was raised somewhat above the pavement, and was injured by her consequent fall. She testified that she "didn't pay any attention to the pavement. \* \* \* Wasn't looking or thinking of any thing; only walking along." Held, she did not exercise reasonable care, and had no right of action against the city. *Robb v. Borough of Connellsville*, 137 Penn. St. 42; 20 Atl. Rep'r, 564.

*Knowledge of defect.*—Where plaintiff was injured by reason of a defect in the sidewalk, the fact that she knew the condition of the walk before the accident does not of itself bar recovery, but is a circumstance to be considered by the jury with the other facts bearing on the question of contributory negligence. *City of Columbus v. Strassner*, 124 Ind. 483; 25 N. E. Rep'r, 65. See, also, *Readdy v. Borough of Shamokin*, 136 Penn. St. 92; 20 Atl. Rep'r, 424.

Where the evidence of the plaintiff proves that the plaintiff, in passing along the street of a town on a dark night, without a lantern or other light, fell over a rock in the middle of the street, and injured herself, when she knew that both the street and sidewalk were out of repair, dangerous and obstructed by dirt, rocks and building material, she will be held to be guilty of contributory negligence, notwithstanding the town authorities neglected to indicate said obstructions by beacons or danger signals, as it was their duty to do. *Hesser v. Grafton*, 33 W. Va. 548; 11 S. E. Rep'r, 211.

*Going upon an overflowed sidewalk in night.*—Where the plaintiff was injured by stepping from an overflowed sidewalk into the gutter, and the evidence showed that he had a child in his arms and was proceeding cautiously at the time and that it was dark, it was held that the evidence sustained a finding that the plaintiff was not guilty of contributory negligence. *Bly v. Village of Whitehall*, 120 N. Y. 506; 24 N. E. Rep'r, 948.

*Runaway horse.*—Where, in an action against a township for an accident alleged to be caused by a defect in the highway, the evidence shows that plaintiff's horse ran away, and thus carried him to the defective spot, it is proper to allow the case to go to the jury. *Wagner v. Jackson*, 138 Penn. St. 61; 19 Atl. Rep'r, 312.

*Drunkenness.*—Where plaintiff was injured by falling upon a defective sidewalk, which a person using ordinary care could pass over in safety, the fact that plaintiff was drunk at the time will support a finding of contributory negligence. *McCracken v. Village of Markesan*, 76 Wis. 499; 45 N. W. Rep'r, 323.

*Breaking down of bridge—plaintiff's knowledge of age of bridge, etc.*—Where plaintiff was injured by the breaking down of a bridge, owing to decayed

timbers, the facts that he knew the age of the bridge and that some of the timbers had decayed and been removed, and that he could have reached his destination by another, though longer, route, do not tend to show contributory negligence. *Apple v. Marion County*, 127 Ind. 558; 27 N. E. Rep'r, 166.

*Falling into area opening in sidewalk — failure to see the opening.* — In an action for injuries caused by falling into an area-way while walking along the sidewalk, it appeared that the area was not guarded, and there was nothing to call plaintiff's attention particularly to it; but it was plainly visible, and could have been observed on looking at it. Above the opening was an attractive show window. Plaintiff was looking at the window, and, in going over to it, fell into the opening. Held, that an instruction that plaintiff was bound to "use his eyes, and look where he was walking, and avoid all obstacles which were dangerous in their character, and were plainly visible and not obscured," was error, since, the facts being undisputed, it, in effect, decided as a matter of law that plaintiff was negligent in not seeing the opening, though his eye was attracted by the window, and there was nothing to call attention to the opening. *Mathews v. Cedar Rapids*, 80 Iowa, 459; 45 N. W. Rep'r, 894.

10. *Notice of claim.* — Under General Statutes Connecticut, section 2678, which provide that no action shall be maintained against a town for injuries to person or property caused by defective roads, "unless written notice of such injury, and of the nature and cause thereof, and of the time and place of its occurrence," shall, within sixty days, be given to a selectman of the town, notice is sufficient where it describes the nature and cause of the injury as follows: "The nature of said injuries being the breaking of my collar-bone of my body, and destroying my clothing, the breaking of my bones being a continuing and lasting injury; all said injuries caused by said defective road, the defect consisting of a dangerous embankment." *Manning v. Town of Woodstock*, 59 Conn. 224; 22 Atl. Rep'r, 42. To the same effect, *Lilly v. Town of Woodstock*, 59 Conn. 219; 22 Atl. Rep'r, 40. The time is sufficiently stated by giving the day of the injury without specifying the hour. *Id.*

Public Statutes of Massachusetts, chapter 52, sections 19, 21, require a person injured by a defect in a sidewalk to give notice to the city within thirty days, in writing, signed by the person injured, or some one in his behalf; but "if, from any physical or mental incapacity, it is impossible for the person injured to give the notice" within the time provided, he may give the same within ten days after such incapacity is removed. Held, in an action by one who had failed to give the notice until about three months after the injury, that evidence showing that she had been confined to her bed; that her head had troubled her since the injury; that at times she had been dizzy, and her mind visionary; that for the first six weeks she was at times delirious in the night-time; that she appeared worse after opiates were given her by the physician's directions; and that she complained of her head frequently — was insufficient to show that it was impossible for her, from "physical or mental incapacity," to have given the notice. *May v. City of Boston*, 150 Mass. 517; 23 N. E. Rep'r, 220. To the same effect is *Ray v. City of St. Paul*, 44 Minn. 340; 46 N. W. Rep'r, 675.

Revised Statutes of Wisconsin, section 1339, which require a notice of an injury resulting from a defective township highway to be served on a member of the town board, but which does not prescribe the mode of service, is sufficiently

complied with by the delivery of the notice to a third person, with directions to serve it on the chairman of the board, and a showing that the notice actually came into his possession within the prescribed time. *Weiting v. Town of Millston*, 77 Wis. 523; 46 N. W. Rep'r, 879. A recital in the notice that the accident occurred "on the main highway, on section 2, town 20 north, of range 2 west, at a point near where said road turns and runs due north, and where said road goes over a hill or bluff," is a sufficient statement of the "place of the accident," required by said section. *Id.* A recital in the notice that "the injury was caused by a hole being washed in the road, so that in descending the hill, going south, the wagon plunged off from a stone table into said washout," is a sufficient description of "the insufficiency or want of repairs which occasioned the accident," required by said section. *Id.*

Where there has been a failure to give the notice required by statute no action can be maintained. *Clark v. Tremont*, 83 Me. 426; 22 Atl. Rep'r, 378; *Ray v. City of St. Paul*, 44 Minn. 340; 46 N. W. Rep'r, 675.

Under Acts of Vermont, 1882, No. 18, section 4, which directs that notice of an injury caused by a defective bridge be given to the town or towns in which it is situated, notice to the two towns in which a bridge is situated is constructive notice to all the towns by whom the bridge is maintained. *Tyler v. Town of Williston*, 62 Vt. 269; 20 Atl. Rep'r, 304.

11. Notice to the municipality of the existence of the defect.—To render a municipal corporation liable for injuries caused by a defective sidewalk, it is not necessary that it should have had actual notice of the defect. If a state of facts exist that such ignorance can only arise from a failure to exercise reasonable official care, notice will be presumed. *City of Lincoln v. Smith*, 28 Neb. 762; 45 N. W. Rep'r, 41; *Campbell v. Kalamazoo*, 80 Mich. 655; 45 N. W. Rep'r, 612; *Whitney v. Lowell*, 151 Mass. 212; 24 N. E. Rep'r, 47.

Where the injuries were received from the misplacement of the cover to a man-hole in a street, plaintiff cannot recover if the only evidence of notice to the city is that workmen were seen cleaning a sewer through the man-hole two days before the accident. *Whitney v. City of Lowell*, 151 Mass. 212; 24 N. E. Rep'r, 47.

Evidence of several resolutions of the council passed during the previous two years ordering the repair of the sidewalk was admissible to show knowledge of its defective condition, when connected with evidence that the repairs were not made. *Thompson v. Village of Quincy*, 83 Mich. 178; 47 N. W. Rep'r, 114.

Where a plank sidewalk, fourteen years old, is repaired by the town authorities by replacing some of the boards with new ones, leaving untouched the stringers on which such boards were laid, the town is chargeable with notice that such stringers were so rotten that they would not hold the nails by which the boards were fastened to them. *Town of Wheaton v. Hadley*, 131 Ill. 640; 23 N. E. Rep'r, 422.

Notice to a member of the city council or to a street commissioner that a street is defective is notice to the city. *Fuller v. City of Jackson*, 82 Mich. 490; 46 N. W. Rep'r, 721; *City of Columbus v. Strassner*, 124 Ind. 482; 25 N. E. Rep'r, 65.

The granting of a permit to make an excavation in the street is notice to the corporation that the work is in progress, and renders it liable for injuries aris-

ing from the negligence of the person doing the work, which is dangerous in itself. *District of Columbia v. Woodbury*, 186 U. S. 450; 10 Sup. Ct. Rep'r, 990.

In an action against a city for personal injuries caused by the falling of an awning on plaintiff while passing along the sidewalk, evidence that the awning for several years had been covered with boards in violation of an ordinance, and that snow had been allowed to accumulate on it for some time before the accident, the weight of which caused the fall, is sufficient to warrant a finding that the city was chargeable with notice of its defective condition. *Bieling v. Brooklyn*, 120 N. Y. 98; 24 N. E. Rep'r, 889.

Where suitable notices are posted and barriers erected by a county on an unsafe county bridge, and the barriers are afterward removed without the county's knowledge or consent, the county is not liable for injuries sustained by a person in attempting to cross the bridge, if it had no actual knowledge of the removal of the barriers, or could not have known of it by the use of reasonable care and diligence. *Weirs v. Jones County*, 80 Iowa, 351; 45 N. W. Rep'r, 888.

Where plaintiff testified that in stepping across a hole in the sidewalk she stepped upon a board apparently sound, but in fact broken, it was error to charge that if the defendant had notice of the hole, but not of the defect in the board, it was nevertheless liable, if in repairing the hole, the defect in the board would have been discovered. *Fuller v. City of Jackson*, 82 Mich. 480; 46 N. W. Rep'r, 721.

Notice to the city may be inferred by the fact that the defect in the sidewalk is immediately in front of the mayor's residence, and that he was accustomed to pass over it daily. *Michigan City v. Ballance*, 128 Ind. 384; 24 N. E. Rep'r, 117.

12. **Pleading.**—Questions as to the sufficiency of the complaint as showing negligence on the part of the defendant or as excluding the inference of contributory negligence on the part of the plaintiff, are considered in the following cases: *City of Columbus v. Strassner*, 124 Ind. 482; 25 N. E. Rep'r, 65; *New Albany v. McCulloch*, 127 Ind. 500; 26 N. E. Rep'r, 1074; *Balbridge & Courtney Bridge Co. v. Cartrell*, 75 Tex. 628; 18 S. W. Rep'r, 8; *Elkhart v. Witman*, 122 Ind. 538; *Campbell v. Kalamazoo*, 80 Mich. 655; 45 N. W. Rep'r, 652.

13. **Evidence of other accidents.**—On the trial of an action against a town for an injury occasioned by a defect in a highway, when one of the issues in the case was the position of a plank at the end of a bridge, and whether it rendered the way unsafe for travelers, evidence that other persons with their vehicles had received injuries at the place of the alleged defect is not admissible to show that the way is defective. *Bremner v. Newcastle*, 88 Me. 415; 22 Atl. Rep'r, 382. To the same effect, *Mathews v. Cedar Rapids*, 80 Iowa, 459; 45 N. W. Rep'r, 894.

In an action against a city for personal injuries sustained in a fall on a sidewalk, caused by plaintiff's slipping on a mound of ice, the testimony of a witness that, two years prior to said accident, he fell on the ice at the same place is incompetent to show either that the walk was unsafe or that defendant had notice of its condition. *Gillrie v. Lockport*, 123 N. Y. 403; 25 N. E. Rep'r, 857.

14. Evidence of other defects in close proximity to one causing the accident.—In an action for injuries caused by a defect in a sidewalk, evidence of other defects, in close proximity to the one causing the injury, is admissible as tending to show notice to the municipal authorities of such defect. *O'Neill v. Village of West Branch*, 81 Mich. 544; 45 N. W. Rep'r, 1028. So where the injury was occasioned by a loose plank in a sidewalk, it was held competent to show that the walk was defective for the entire block, as tending to show notice to the defendant. *McConnell v. City of Osage*, 80 Iowa, 298; 45 N. W. Rep'r, 550.

15. Statute providing for joint action against the city and the person causing the defect.—The charter of the city of Sheboygan (Laws Wis. 1874, chap. 236) provides that, where a personal injury has happened through a defect in a street caused by the negligence of a third person, the city shall not be liable until all remedies against the negligent person have been exhausted. A subsequent general act (Laws Wis. 1889, chap. 471) provides that, where an injury "has happened" as above described, the negligent person shall be primarily liable, but the city may be joined as defendant with him, and judgment shall be entered against all parties found liable; but further action against the city shall be stayed until an execution against the negligent person has been returned wholly or partially unsatisfied. Held, the general statute, though retroactive, affects a remedy only, and, therefore, applies to an injury for which suit was pending when it was enacted. *Raymond v. Sheboygan*, 76 Wis. 335; 45 N. W. Rep'r, 125. Since the enactment of this general statute, the city is not merely a guarantor of the collectibility of the judgment against the negligent person, and, therefore, is not released from liability by delay in prosecuting the claim. *Id.*

16. Statute exempting city from liability for misfeasance or non-feasance of its officials.—Laws of New York, 1873, chapter 863, title 19, section 27, exempting the city of Brooklyn from liability for any misfeasance or non-feasance of the common council or of any of the city officials in the discharge of any duty imposed on them as officers, does not relieve the city from liability for failure to discharge any of its corporate functions, one of which is the duty of keeping its streets in repair; and the commissioner of city works and his subordinates, who are placed in charge of the streets, subject to the direction of the common council, must be treated as mere instrumentalities created to perform for the city its corporate function, for whose negligence it remains liable. *Bieling v. Brooklyn*, 120 N. Y. 98; 24 N. E. Rep'r, 389.

## PLANK'S TAVERN CO. V. BURKHARD ET AL.

(Supreme Court of Michigan, July 23, 1891.)

1. STOCK AND STOCKHOLDERS. PRELIMINARY AGREEMENT TO TAKE STOCK. LIABILITY. Defendants signed a subscription paper reciting that "we, the undersigned citizens of S., promise to pay the trustees of the hotel to be built at S. the sums set opposite our names, to be taken as stock, \$25 per share." It was represented to them by the citizens' committee, soliciting subscriptions

that the hotel would cost \$150,000, and that this paper was informal, and was merely "to see what could be done," and that a binding subscription paper would be presented later. When this was presented, defendants refused to sign. Afterward a corporation was formed, and an hotel built, costing about \$110,000, and stock to the amount subscribed was tendered, but refused by defendants. Held, that they were not liable to the corporation for the sum thus subscribed. *Distinguishing Association v. Walker*, 47 N. W. Rep'r, 338; 88 Mich. 386.

**E**RROR to circuit court, Berrien county, Thomas O'Hara, judge. Action by the Plank's Tavern Company against Joseph H. Burkhard and another upon a stock subscription. Verdict directed for defendants, and plaintiff brings error. Affirmed.

*Lawrence C. Fyfe* for appellant. *C. B. Potter (Potter & Potter)*, of counsel for appellees.

MORSE, J. In the winter of 1888 and 1889 there was talk among the people of the village of St. Joseph about building a large hotel under the auspices of an incorporated hotel company. This agitation in regard to the building of an hotel was occasioned by the visit of John O. Plank to the village, who represented to its citizens that he would cause the erection in the village of a large summer hotel, with a capacity of entertaining five hundred guests or more, said hotel to cost \$150,000, in case the people of St. Joseph would subscribe \$20,000, to be taken in stock in a corporation to be organized for the construction and operation of such an hotel. An informal meeting of citizens was held, and at such meeting it was thought best by those present to accept Mr. Plank's proposition, and a committee was appointed to solicit subscriptions. Neither of the defendants attended the meeting, and testify that they had never heard of Mr. Plank at the time they subscribed the following paper, which was presented to them by the committee, and signed, as they claim, with reluctance, and upon the representation that the hotel was to cost \$150,000: "We the undersigned citizens of St. Joseph, promise to pay the trustees of the hotel to be built at St. Joseph the sum set opposite our names, to be taken as stock, \$25 per share." This was signed by a large number of persons, and by the defendants as copartners, as follows: "Burkhard Bros., \$200." Defendants also testified that they were told before signing that this paper was not binding. "It was merely to see what they could do. They said they

would be around with the binding list afterward." It seems that afterward the committee did go around with a more formal paper, and as fast as it was signed by those signing the first paper, their names were erased from the first subscription. There was evidence on the part of the plaintiff tending to show that there was no abandonment of this first list, and that the second paper was drawn up for the purpose merely of getting all the subscribers on one paper, as several subscription lists had been circulated in the first place. But there was testimony tending to show that this first paper was informal, and not meant as the final binding subscription, which is also corroborated by the erasures on the first list of the names of those signing the more formal subscription paper. Unfortunately this last paper was not produced, nor was there any clear testimony as to its contents. When this second paper came around, the defendants absolutely refused to sign it, and declined to pay any thing toward the building of the hotel. Subsequently to this refusal a corporation was formed called "The Plank's Tavern Company," for the purpose of building an hotel in the said village, with a capital stock, stated in the articles of incorporation to be \$250,000, and the number of shares to be ten thousand, and the shares to be \$25 each. The stockholders in such corporation were five in number as follows: John Carter, of Detroit, four hundred and eighty shares; Norman Buckley, Elkhart, Ind., six hundred shares; John O. Plank, Detroit, eight shares; John Bell, Benton Harbor, eight shares; John Hyman, Jr., St. Joseph, twenty shares. The office of the corporation was located at Detroit, Mich., and the articles of association were acknowledged by the said stockholders between the 22d day of April and the 4th day of May, 1889. September 10, 1889, eight shares of the stock of this corporation were made out to the defendants, and soon thereafter tendered to them. They refused to receive the certificate. This suit was commenced in justice court upon defendants' subscription, and judgment obtained by plaintiff. On appeal to the circuit court of Berrien county, the judge of that court directed a verdict for the defendants, giving his reasons at some length for so doing.

The hotel was built by this incorporated company, but its whole cost, including furniture and every thing else necessary to equip the hotel for business, did not exceed \$110,000, if it reached that



figure. The directors of the company have mortgaged the hotel to John O. Plank, for \$60,000. The theory of the plaintiff is that the hotel was built relying upon the promise of the defendants to pay their subscription, and it is argued that the case is ruled by *Peninsular Railway Co. v. Duncan*, 28 Mich. 130, and the late case of *Association v. Walker*, 83 Mich. 386 ; 47 N. W. Rep'r, 338. But we think there is a material difference between the case before us and either of the cases relied on by plaintiff's counsel. In the case against Duncan, he had signed a preliminary subscription paper, provided for and authorized by statute, as one of the original associates for the formation of a railroad company, and signed a subscription agreeing to take a certain number of shares of the capital stock of the proposed company, and to pay therefor "at such times and in such sums as the same shall be assessed, demanded and required to be paid by the directors of said company." In the majority opinion it is said: "In the present case it does not become necessary to discuss the question whether a party who expressly revokes his subscription before the corporation is formed can be compelled to pay it afterward." Page 138. In the same opinion, at page 134, it is also said that the agreement must be mutual, and that there would be no difficulty at common law in enforcing the "promises contained in an agreement of this general nature against the several promisors, where the object to be accomplished was lawful, where a beneficial purpose was in view, and where it was possible to make to the several promisors the return which their subscription called for. In such case the promises are mutual; acts are done and money expended in reliance upon the subscriptions; and the moment the promises are accepted by the organization and action of the corporation, to which they are provisionally made, there can generally be no difficulty in their enforcement, if the corporation then has it in its power to give the stock subscribed for and offers to do so."

In the present case the defendants expressly revoked their subscription before the corporation was formed, and nothing could have been done in reliance upon it; nor was there enough of the subscribers to form a contract in and of itself. It was necessary for the plaintiff, in order to make a case upon it, to supplement and add to its terms by parol evidence. It was not

as full and definite as either of the subscriptions in the two cases cited by plaintiff's counsel. Nor did the defendants here, as in Walker's Case, attend any meeting of the subscribers, or take any part in forming or organizing the corporation. They did not stand by, as he did, and see the moneys being expended, the ground purchased, and the building erected; but, on the contrary, had nothing to do with the matter, and gave neither express nor silent assent. The corporators well knew when the company was organized and the moneys expended that defendants expressly repudiated the whole arrangement. And there is nothing in the agreement connecting defendants' subscription with the plaintiff corporation. As was well said by the circuit judge, that if, at the same time that John O. Plank and his four associates were perfecting their organization, five or more of the subscribers to this subscription paper, living at St. Joseph, had, in good faith, executed other articles of association for the purpose of constructing an hotel in that village, it would not have been an easy matter to have determined the identical corporation had in mind by the defendants when they signed the subscription paper. The identity had to be found by parol evidence, and, when we go into the realm of oral testimony to fix the liability of these defendants, we find, without serious dispute, that the hotel built by the plaintiff was not such an hotel as was contemplated by the signers to this paper, and that it failed to meet in many particulars the representations made to the defendants to obtain their signatures as copartners. The circuit judge was right, and the judgment is affirmed, with costs. The other justices concurred.\*

**Corporations** — preliminary agreement to subscribe for stock. — This subject is discussed at length in note to *International Fair & Exposition Assn. v. Walker*, 3 Am. R. R. & Corp. Rep. 731.

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### DANIELS V. NEW YORK & N. E. R. Co.

(Supreme Judicial Court of Massachusetts, Sept. 3, 1891.)

1. RAILROAD COMPANIES TURN-TABLE. INJURY TO CHILD. LIABILITY. A railroad company owning a turn-table situated on the company's land, about six hundred feet from two highways, and having upright guy-bars, is not

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\* Reported in 49 N. W. Rep'r, 562; 87 Mich. 182.

bound to keep it locked on the ground that it is an attractive object to children, and a child injured while playing thereon cannot recover.

**E**XCEPTIONS from superior court, Suffolk county, Albert Mason, chief judge. Action by Daniels against the New York and New England railroad. Direction of verdict for defendant. Plaintiff excepts. Overruled.

*Everett W. Burdett and Charles A. Snow* for plaintiff. *Charles A. Prince and R. D. Weston-Smith* for defendant.

LATHROP, J. The plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turn-table; and the proposition of law upon which he relies is that, if a railroad company leaves a turn-table unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turn-table, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to refrain from ordinary negligence with respect to the condition and management of its turn-table. The turn-table is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about one thousand feet from the turn-table; that they then asked some trainmen who were switching cars on the tracks adjacent to the turn-table to let them ride on the cars, and, on being refused, went to the turn-table. The only thing stated in the exceptions, to show that the turn-table was attractive is that it had large upright standards or guys, twelve or fifteen feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into

two classes. Those of the first class rest upon the proposition that, if a turn-table is of a dangerous nature and character, when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turn-table to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. *Stout v. Railroad Co.*, 2 Dill. 294; *Railroad Co. v. Stout*, 17 Wall. 657. The decision of the supreme court of the United States was apparently approved of in *Railroad Co. v. Bailey*, 11 Neb. 332; 9 N. W. Rep'r, 50, and followed in *Railway Co. v. Simpson*, 60 Tex. 103; *Railway Co. v. Styron*, 68 Tex. 421; 1 S. W. Rep'r, 161; *Evan-sich v. Railway Co.*, 57 Tex. 123; *Railway Co. v. McWhirter*, 77 Tex. 356; 14 S. W. Rep'r, 26. See, also, *Bridger v. Railroad Co.*, 25 S. C. 24; *Ferguson v. Railway Co.*, 75 Ga. 637; 77 Ga. 102. The second class of cases proceeds upon the doctrine of constructive invitation; that is, that if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser; and it is held that leaving a turn-table unguarded is such an act. *Keffe v. Railway Co.*, 21 Minn. 207; *O'Malley v. Railway Co.*, 43 Minn. 289; 45 N. W. Rep'r, 440; *Railway Co. v. Fitzsimmons*, 22 Kans. 686; *Nagel v. Railway Co.* 75 Mo. 653. The decision of the supreme court of the United States in *Railroad Co. v. Stout* rests upon the proposition stated by Mr. Justice Hunt, "that, while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." The cases cited in support of this proposition are *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardner*, 19 Conn. 507; *Daley v. Railroad Co.*, 26 Conn. 591, and *Bird v. Holbrook*, 4 Bing. 628. With the exception of *Daley v. Railroad Co.*, all of these cases come within other rules, or within well-defined exceptions to the general rule that a land-owner owes no duty to a trespasser, except he must not wantonly or intentionally injure him or expose him to injury. *Lynch v. Nurdin*, *ubi supra*, rests upon the doctrine that, if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child

wrongfully meddles with the obstruction. The contrary, however, was held in *Hughes v. Macfie*, 2 Hurl. & C. 744, and in *Mangan v. Atterton*, L. R., 1 Exch. 239. In *Lane v. Atlantic Works*, 111 Mass. 136, the plaintiff was found to be without fault, and not a trespasser. See, also, *Clark v. Chambers*, 3 Q. B. Div. 327; *Powell v. Deveney*, 3 Onsh. 300. *Birge v. Gardner*, *ubi supra*, rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332.

*Bird v. Holbrook*, *ubi supra*, decides that a land-owner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that, if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same, though no notice is given. *Johnson v. Patterson*, 14 Conn. 1. This, as pointed out by Morton, J., in *Marble v. Ross*, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. *Marble v. Ross*, *ubi supra*. The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. *Larue v. Hotel Co.*, 116 Mass. 67; *Beck v. Carter*, 68 N. Y. 283. The case of *Daley v. Railroad Co.*, *ubi supra*, so far as it tends to support the result reached in *Railroad Co. v. Stout*, *ubi supra*, must be considered as overruled by *Nolan v. Railroad Co.*, 53 Conn. 461; 4 Atl. Rep'r, 106.

The court of appeals of New York has stated, in a well-considered case, that it does not uphold the decision in *Railroad Co. v. Stout*, *ubi supra*, and, although it seeks to distinguish that case from the one before it, the difference between the two cases is not very apparent. *McAlpin v. Powell*, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived, upon the platform of a fire-escape, and fell through a door-trap therein, which was insecurely fastened. The defendant was the landlord of the house and it was his duty to keep the fire-escape in order. It was held that he owed no duty to one who was using the fire-escape for his

own pleasure, and that the defendant was not liable. In *Frost v. Railroad Co.*, 64 N. H. 220; 9 Atl. Rep'r, 790, the plaintiff, a boy seven years of age, was injured while playing upon a turn-table of the defendant's railroad. The ground upon which he sought to recover was that he was attracted to the turn-table by the noise of boys playing upon it. The turn-table was on the defendant's land, about sixty feet from the public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser, and that, under the circumstances, the defendant owed him no duty.

The court expressly refused to follow the case of *Railroad Co. v. Stout*, *ubi supra*. On the question whether the defendant was liable on the ground of an implied invitation, Clark, J., in delivering the opinion of the court, said: "One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or inclose it, or exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys, who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731, and cases cited; *Clark v. Manchester*, 62 N. H. 577; *Klix v. Nieman*, 68 Wis. 271; 32 N. W. Rep'r, 223; *Gramlich v. Wurst*, 86 Penn. St. 74; *Canley v. Railway Co.*, 95 Penn. St. 398; *Gillespie v. McGowan*, 100 Penn. St. 144; *Hargreaves v. Deacon*, 25 Mich. 1. See, also, *Sweeny v. Railroad Co.*, 10 Allen, 368; *Metcalfe v. Steamship Co.*, 147 Mass. 66; 16 N. E. Rep'r, 701,

and cases cited; *Barstow v. Railroad Co.*, 143 Mass. 535; 10 N. E. Rep'r, 255. In *Johnson v. Railroad Co.*, 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars, and went to a house near by, intending to take a later train for Lawrence. After remaining at the house for a while, she returned to the station, and, while crossing the tracks to the station of another railroad corporation to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth so as to form a convenient passage-way; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it, and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passage-way by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See, also, *Wright v. Railroad Co.*, 129 Mass. 440. In *Morrissey v. Railroad Co.*, 126 Mass. 377, a child, four years of age, was run over by the cars of a railroad corporation while using the track as a play-ground. There was a foot-path across the track which was used by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the path.

The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and willful carelessness; and this question was submitted to the jury, who found for the defendant. In *Wright v. Railroad Co.*, 142 Mass. 296; 7 N. E. Rep'r, 866, there was a well defined path leading to a railroad track, and an opening in a ridge near the track, and a passage-way for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight-cars stood on the

track an opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age, was injured while going to school, and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track. The case of *McEachern v. Railroad Co.* 150 Mass. 515; 23 N. E. Rep'r, 231, came up on demurrer to the declaration, which alleged, in substance, that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable, upon receiving a slight touch, to fall to the ground; that the defendant well knew that said car "then was, and would be, an enticing, attractive and inviting object to children, and well knowing that children then were, and long prior thereto had been, accustomed to play in, upon, around and about such cars as might happen from time to time to be placed upon any of said side tracks;" that the plaintiff, being then upward of eleven years of age, was traveling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant, and that the defendant owed him no duty to have the car safe for him to visit. In *McCarty v. Railroad Co.*, 153 Mass. —; 27 N. E. Rep'r, 778, a child about five years old strayed from the yard of the house in which it lived onto a street, and thence into the freight yard of a railroad corporation, where it was injured. The freight yard was parallel with the street, and there was no fence between them. It was held, in the absence of evidence that a fence was required by Public Statutes, chapter



112, section 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff. The cases which we have last cited are conclusive of the one at bar, whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him. The superior court rightly directed a verdict for the defendant. Exceptions overruled.\*

**Railroad companies — turn-table cases.**— The turn-table cases are collected and reviewed in note to Gulf, etc., R. Co. v. McWhirter, 8 Am. R. R. & Corp. Rep. 158. The owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with any thing that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it, is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them, and what that degree of care requires him to do is ordinarily a question for a jury. *O'Malley v. St. Paul, etc., R. Co.*, 43 Minn. 289; 45 N. W. Rep'r, 440. While, in the case of its turn-tables and trucks standing on its tracks, by playing with which such children are injured, it is competent for a railroad company, in order to show that it exercised due care, to prove that it secured the turn-tables and trucks in the way customary with all railroad companies, such proof is not conclusive that due care was exercised. *Id.*

The following recent decisions on the subject, not yet officially reported, are referred to and will be noticed more at length in later volumes. *Bates v. Nashville, etc., R. Co.* (Tenn.), 15 S. W. Rep'r, 1069; *Ft. Worth, etc., R. Co. v. Measles* (Tex.), 17 S. W. Rep'r, 124; *Ft. Worth, etc., R. Co. v. Robertson* (Tex.), 16 S. W. Rep'r, 1093; *Barrett v. Southern Pac. R. Co.* (Cal.), 27 Pac. Rep'r, 666.

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## HAGEN v. CHICAGO, D. & C. G. T. J. R. Co.

(Supreme Court of Michigan, July 23, 1891.)

1. RAILROAD COMPANIES. SETTING FIRES. EVIDENCE OF NEGLIGENCE. QUESTIONS FOR JURY. In an action against a railroad company for damages by fire caused by sparks from a locomotive, the bare, uncontradicted evidence that the apparatus was in good order, and was properly managed, and that the engineer and fireman were competent and skillful, does not establish the fact that the fire did not thus originate, in the absence of proof that it could have originated in any other way.

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\* Reported in 28 N. E. Rep'r, 293.

2. The fact that this fire, and another one in a field a short distance away, did occur immediately after the passage of the locomotive, when connected with evidence that the apparatus, when in good order and properly managed, could not throw sparks to the building, was so inconsistent with evidence given by the company that the apparatus was in good order, and properly managed, as to raise a question for the jury, although the company's evidence was not expressly contradicted.

3. EFFECT OF PLAINTIFF COLLECTING INSURANCE FOR THE PROPERTY DESTROYED. The defendant is entitled to no reduction of damages by reason of the fact that plaintiff has collected insurance upon the property destroyed. Following *Perrott v. Shearer*, 17 Mich. 48.

4. DUTY OF COMPANY AS TO APPLIANCES. A railroad company is bound to adopt and use only such appliances as, in the progress of science and improvement, have been shown by experience to be the best, and which are generally known.

5. HIGH SPEED AS EVIDENCE OF NEGLIGENCE. It is the duty of a railroad company to run its trains as near on time as possible, and for it to run a way-freight at the rate of forty miles an hour, is not in itself negligence.

**E**RROR to circuit court, Macomb county, Arthur L. Canfield, judge. Action by August Hagen against the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company, for damages by fire. Judgment for plaintiff. Defendant brings error. Reversed.

*E. W. Meddaugh* (*H. Geer* of counsel) for appellant. *Lungerhausen & Erskine* (*Thos. M. Crocker* of counsel) for appellee.

McGRATH, J. This action was brought to recover the value of certain buildings and contents destroyed by fire, alleged to have been caused by sparks thrown from an engine running upon defendant's road, upon which plaintiff's farm abuts. Plaintiff had judgment, and defendant appeals.

Plaintiff's testimony tended to show that the fire occurred September 15, at about nine o'clock A. M.; that the buildings burned were located about one hundred and sixty feet from the tracks; that there had been no rain for about four weeks and every thing was very dry; that there was a high wind, which was blowing with the train, and in the direction of plaintiff's buildings; that the train was running at a high rate of speed; that the engine was laboring very hard; that the fireman had the door of the fire-box open and was poking the fire; that the poking of the fire would tend to throw out sparks; that, as the engine approached plaintiff's buildings, smoke of a bluish-gray color, streaked with

red, was seen to roll over the buildings, and in the course of a few minutes, fire was discovered in the shingle roof of one of the sheds, which spread into the other buildings; that the roof which took fire sloped toward the train as the train approached; that just before it reached plaintiff's place, after the same train had passed, on that morning, fire was discovered in a clover field near defendant's right of way, about half a mile south of plaintiff's buildings, in the direction from which the train came. Defendant's testimony tended to show that the machinery, smoke-stack and fire-box of the engine were in good order and were of the most approved kind, the best in use; that they had been examined on the morning of that day and were examined the next day after the fire, by competent persons and found to be in good order; that the engineer and fireman were skillful and competent and were managing the train carefully and skillfully; that the fireman was not poking the fire as it passed plaintiff's premises; that it was not necessary to poke the fire, and that poking the fire would not tend to throw out sparks; that an engine, in good repair and properly managed, could not throw fire from the track to plaintiff's buildings, and that the barn was on fire before the train reached the buildings. The fact and extent of the fire was not disputed, nor was it attempted to be shown that the fire could have originated in any other way.

The first question raised is that the verdict of the jury is not warranted by the evidence; that inasmuch as the testimony introduced by defendant, that the apparatus was in good order, and was properly managed, and that the engineer and fireman were competent and skillful, was uncontradicted, those facts should have been treated as established, and a verdict directed for the defendant. In the absence of any testimony tending to show that the fire could have happened in any other way, the jury was justified in finding that the fire was started by a spark from the locomotive. Having concluded that the fire was caused in that manner, they were entitled to consider, as bearing upon the question of negligence, not only defendant's testimony as to the condition of the locomotive, the competency and skillfulness of the engineer and fireman, and the proper management of the locomotive on that occasion, but also the testimony as to the poking of the fire, its effect upon the emission of sparks, and in that connection de-

defendant's testimony that it was unnecessary to poke the fire. As bearing upon the question of the condition of the smoke-stack and fire-box, and the management of the locomotive on that occasion, they were entitled to consider the testimony regarding the clover-field fire, and the testimony offered by defendant that an engine in good order, and properly managed, could not possibly throw fire from the track to plaintiff's buildings. The only inference that could be drawn from the testimony relating to the impossibility of the communication of fire from the locomotive to plaintiff's buildings, in view of the circumstances of fire, was that the engine was either not in good order or was not properly managed. *Johnson v. Railway Co. (Iowa)*, 42 N. W. Rep'r, 512. Testimony cannot be said to be undisputed, when inconsistent with some other fact or circumstance, either established or regarding which testimony has been admitted. The court very properly declined to take the case from the jury, or to pass upon the conclusiveness of the testimony offered by the defendant.

It appeared that the buildings which were destroyed had been insured, and that the insurer had paid the loss, but the court rejected testimony as to the amount paid as immaterial, and this is assigned as error. The question is ruled by *Perrott v. Shearer*, 17 Mich. 48-55.

The court instructed the jury that, "if you find that the fire was caused by a spark from the engine, the law raises a presumption of liability on the part of the defendant. The burden of proof is then passed upon defendant, in order to escape such liability, to show affirmatively, to your satisfaction, that the engine from which the fire originated was, at the time in question, properly constructed, and equipped with the best approved appliances for preventing the escape of fire. \* \* \* In regard to the construction of its engine and appliances to prevent the escape of fire and sparks, a railroad company is required to keep constantly in use 'the most approved machinery and apparatus for that purpose on their engines.' \* \* \* (3) If you are satisfied from the evidence that, at the time in question, the defendant's engine was properly constructed and equipped with the best-known and most approved apparatus to prevent the escape of fire therefrom, and that the same was in good repair, as to its machinery, fire-box and smoke-stack, and the engine and train was properly

managed with reasonable and ordinary care and skill by the servants and employes of the railway, then the plaintiff is not entitled to recover, and your verdict should be for the defendant.

\* \* \* (4) It is not negligence in a railroad company to run an engine which emits sparks, providing the company has the engine equipped with means and appliances to arrest the escape of sparks, recognized as the best known and in use, and approved as such by experienced operators. \* \* \* (5) If you do so find, then you will consider the question whether the defendant has satisfied you, by a fair preponderance of the evidence, that the engine was equipped as I have stated to you, with proper and the best-known appliances to prevent the escape of fire."

Defendant introduced several witnesses, who testified that the machinery, smoke-stack, fire-boxes, netting and all the equipments of that engine for providing against the escape of fire and cinders, and providing against the danger of setting fires, were of the most approved order, form and pattern known; that they were claimed to be the best in use, and that they were in use by the great majority of railroads in this country. The defendant requested the court to instruct the jury that "the engine was in good order, so far as this case is concerned, if at the time it was supplied with the best approved appliances to prevent the escape of fire, and such appliances were in good repair. In view of the fact that it is impossible to prevent the escape of sparks from a locomotive, it is not negligence in a railroad company to run an engine which emits sparks, provided the company has the engine equipped with means and appliances to arrest the escape of sparks, recognized as the best known and in use, and approved as such by experienced railroad operatives. The appliances which a railroad are by law to use, to comply with its duty, are those most efficient to prevent the escape of sparks of the smallest size, consistently with the successful making of steam."

While the instructions given were in accord with the defendant's theory of its own duty in the premises as indicated by its proofs and its requests, and for this reason, if no other error appeared, we might hesitate to reverse the judgment, yet the instructions that defendant was "required to keep constantly in use the most approved machinery," of "the most approved pattern," the "best known and most approved apparatus," the "best-

known appliances," without further explanation, were misleading. The statute provides that "any railroad company building, owning or operating any railroad in this state shall be liable for all loss or damage to property by fire originating from such railroad, either from engines passing over such roads, fires set by the company employes by order of the officers of said road, or otherwise originating in the construction or operating of said railroad; provided that such railroad company shall not be held liable if it prove, to the satisfaction of the court or jury, that such fire originated from fire by engines whose machinery, smoke-stack or fire-boxes were in good order and properly managed." This statute contemplates the communication of fire, and consequent loss and damage, notwithstanding the exercise of prudence and care in the selection of appliances, and in the management and operation of trains. It fixes the standard of condition and management, but it does not attempt to establish a standard of kind or quality of appliances.

While the degree of care required of a railroad company, respecting the management and operation of its trains, must vary according to circumstances, there must of necessity be some stability in appliances, and railroad companies cannot be expected to be constantly changing appliances, or to instantly apply newly-discovered devices, nor can they be required to adopt every new and untried instrumentality, even though subsequent experience may demonstrate the same to be the more efficient. Indeed, the introduction of untried devices may of itself be negligence. The efficiency of an appliance can only be demonstrated by actual experience, and adoption and use are the real tests of approval. In view of our statute, and other similar statutory provisions which make railroad companies *prima facie* liable, prudent railroad companies naturally adopt appliances which will most effectually protect them from that liability, and at the same time protect their own property, and the general use of apparatus for that purpose grows out of these considerations. No individual should be held to a higher degree of care and prudence, in the selection and adoption of appliances, than that which is generally exercised by prudent railroad men using appliances for the same purpose.

Unreasonable requirements should not be exacted. There should be some degree of security in the use of apparatus. The

fact that an appliance is commonly used by prudent railroad men, and has been for a long time, for the same purposes, and has substantially guarded against the danger sought to be avoided, should be a good defense to a charge of negligence because of its use. Wide differences of opinion may exist among those desirous of reaching the same result. Two or more kinds of appliances may be used, each one of which is approved by a number of railroad companies, which are managed by practical and prudent men, and the adoption of each may have been after careful consideration of the merits of all, yet, unless that adoption and approval has some weight, there is no safety in the use of either. In any event, before a railroad company can be made liable by reason of its failure to adopt other appliances, it must be shown that such appliances have been well and popularly known, and their efficiency demonstrated by actual use. In *Hoyt v. Jeffers*, 30 Mich. 181-192, cited by plaintiff, the rule laid down was applied to the facts of that particular case, and was subjected to qualifications. A mill was set in the midst of a city, and the mill chimney was without any apparatus for arresting the escape of sparks; and the court held that it became the duty of the owner of the mill to avail himself of some such apparatus as experience has shown to be reasonably adequate, if not the most effectual, to prevent the escape of sparks and fire from his chimney, whether such apparatus had ever been previously used upon that particular kind of chimney or not, so long as they are susceptible of being applied, and if so applied, would operate to prevent or check the escape of such fire and sparks. It was then shown that spark-catchers constructed upon the same principle as those long in use, and well and properly known upon other smoke-stacks, would, if applied to this chimney, have substantially avoided the danger; and the court say that this was so long and generally known that it was the duty of the defendant to have known it, and to have availed himself of their use. "In fact, I think the true rule is that the defendant, in adopting means to check the flow of sparks, and to avert the danger in question, under the circumstances of this case, was bound not only to adopt the means calculated to avert the danger, but the means which in the progress of science and improvement, has been shown by experience to be the best; unless, indeed, it be some invention so recently made as not to be gen-

erally known, or which the defendant, by reasonable inquiry for the best means, might not fairly be supposed to have obtained knowledge of, or unless the expense of such particular invention should be so excessive as to render its requirement practically unreasonable, when a less expensive mode of protection, substantially guarding against the danger, might be held sufficient." In the present case there was no evidence offered which tended to show that there were other appliances superior in kind to those in use, or even that there were other appliances used for that purpose, much less that there were other generally known and approved devices, which were more efficient, and defendant was entitled to an instruction that it was not negligent in the selection and adoption of its apparatus. The phrase "the best known appliances," is susceptible of different interpretations. It may be taken to mean the best appliances known, or the best approved or acknowledged appliances, or those appliances which are best known.

Plaintiff offered testimony tending to show that the train was running at the rate of forty miles an hour; that the weather was very dry, and a high wind was blowing at the time. Defendant requested the court to instruct the jury as follows: "You are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movements of trains. The risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays; that it would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather. Those who establish themselves in the neighborhood of railroads must know that trains are expected to run regularly, and, if there are special risks arising from no want of care in the proper equipments and management of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation." The court gave the last paragraph, but declined to give the first. Defendant's counsel also requested the court to give the following, but the court declined: "The engineer and fireman, in managing the train, are at liberty, and it is their duty, to run their trains as near on time as possible; and in case a way-freight, whose length of stops at stations is necessarily irregular, they are not to be con-



sidered negligent by their use of natural and reasonable means to make time." It must be conceded that in operating a railroad it becomes necessary, at times, to make time between given points, and the running of a freight train at the rate of forty miles an hour for this purpose is not in itself negligence. The law insists, however, that with increased speed must be associated a higher degree of care. Trains must be run with regularity, and with reference to the movements of other trains, in dry weather as well as in wet weather. Uninstructed, the jury was at liberty to find that, although the train may have been properly equipped, the high rate of speed was improper management of the train. The defendant was entitled to the instructions asked for, and for this error the judgment must be reversed, and a new trial granted, with costs.\*

Champlin, C. J., and Morse and Long, JJ., concurred. Grant, J., concurred in the result.

1. **Railroad companies — fires set by locomotives.**— A complaint which alleges that defendant allowed dry grass and other inflammable material to accumulate on its right of way, which caught fire from sparks negligently allowed by defendant's employes to escape from one of its engines, and that the fire spread to plaintiff's land and destroyed his grass, states a good cause of action. *Chicago, etc., R. Co. v. Burger*, 124 Ind. 275; 24 N. E. Rep'r, 981. In an action to recover for property destroyed by a fire set by a railroad locomotive, a verdict involving a finding of negligence in the operation of the locomotive sustained, in view of the statutory presumption of negligence and the failure to show whether the dampers, ten inches wide and four feet long, at the front and rear of the ash-pan beneath the fire-box, or either of them, were closed. *Cautlon v. Eastern Ry. Co.*, 45 Minn. 481; 48 N. W. Rep'r, 22. Where, in such case, plaintiff did not identify the engine alleged to have caused the fire, it was proper for defendant to show that all the engines which passed plaintiff's place at the time of the fire were in good order, well supplied with proper appliances for preventing the escape of fire and properly operated and it was not necessary for defendant to show what particular engines caused the fire. *Biering v. Gulf, etc., R. Co.*, 79 Tex. 584; 15 S. W. Rep'r, 576. The following cases turned upon questions of fact and the verdicts were held to be sustained by the evidence: *Hayes v. Chicago, etc., R. Co.*, 45 Minn. 17; 47 N. W. Rep'r, 260; *Wilson v. Northern Pac. R. Co.*, 43 Minn. 519; 45 N. W. Rep'r, 1132.

2. **Fire escaping from right of way.**— Where a railroad company, by its agents and employes, in burning off its right of way, negligently allows the fire to escape upon the premises of the adjacent land-owner, where it consumes the property of the latter, the injury thus inflicted falls fairly within the scope

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\* Reported in (N. W. Rep'r), 86 Mich. 615.

of the statute as the result of a fire caused by the operation of said railroad. *Missouri Pac. R. Co. v. Cady*, 44 Kans. 633; 24 Pac. Rep'r, 1088.

The act of a railroad company in starting a fire on a bed of peat, upon which its track was laid, at a season of great drought, is a positive wrong, which renders it liable for injury to adjacent property and the fact that plaintiff's land was not the first to be reached by the fire will not prevent a recovery. *Louisville, etc., R. Co. v. Nitsche*, 126 Ind. 229; 26 N. E. Rep'r, 51.

After a fire started on defendant's right of way, by its negligence, had been apparently extinguished, a wind arose and the next day a fire in that vicinity spread to plaintiff's land and damaged his property. Held, that the question whether defendant's negligence was the proximate cause of plaintiff's loss should be left to the jury. *Haverly v. State Line, etc., R. Co.*, 135 Penn. St. 50; 19 Atl. Rep'r, 1013. It appearing that the plaintiff knew of the fire before it extended to his land, and poured water on it until he considered it extinguished, the question whether he was guilty of contributory negligence in leaving the fire until it was completely extinguished is for the jury. *Id.*

3. **Burning fence — escape of stock — liability of company.**— A railroad company which has negligently burnt a pasture fence is not relieved from liability for the loss of horses that escaped in consequence thereof by the fact that such horses had been driven from a remote part of the state a few days before, and that the company had no notice of their character, as it could reasonably have anticipated that the owner of the pasture would put therein stock that would be liable to stray off but for the fence. *St. Louis, etc., R. Co. v. McKinsey*, 78 Tex. 298; 14 S. W. Rep'r, 645.

4. **Destruction of growing timber and trees — measure of damages.**— Where fire is negligently allowed to escape from the right of way, upon adjacent premises, and it burns and injures a natural growth of young timber and trees, the measure of damages is the amount of the damage the trees and timber suffered by reason of the fire, and not the difference in the value of the land with the standing trees and timber before the fires and afterward, nor the market-price of the trees for transplantation as shade or ornamental trees. *Fremont, etc., R. Co. v. Crum (Neb.)*, 46 N. W. Rep'r, 217.

5. **Contributory negligence.**— If the plaintiff was in a position to have prevented any damage from fire to his property without incurring unusual danger, and made no effort to do so, it was negligence on his part, and precludes his right of recovery. *Eaton v. Oregon R. & Nav. Co. (Ore.)*, 24 Pac. Rep'r, 415.

## FIRST NAT. BANK OF MT. VERNON ET AL. V. SARLLS ET AL.

(Supreme Court of Indiana, Sept. 22, 1891.)

1. **MUNICIPAL CORPORATIONS. FIRE LIMITS. ENJOINING VIOLATION OF ORDINANCE.** Where a city ordinance prohibits the erection of wooden buildings within its fire limits, individuals who show a threatened violation of the ordinance, and that if unrestrained it will work irreparable injury to them

and their property, are entitled to an injunction, though the building if erected would not be a nuisance *per se*.

2. JOINDER OF PARTIES. Where the owners of separate and distinct tenements would each be injured by the erection of a building prohibited by ordinance, they may join in an action to restrain the erection of such building.

3. ORDINANCE PROHIBITING THE REPAIR OF FRAME BUILDINGS PARTIALLY DESTROYED BY FIRE. The owner of a valuable wooden building has the right to repair it, whether such repairs will cost \$300 or more; and an ordinance of the city of Mt. Vernon, which prohibits the erection or repair of a wooden building within the fire limits of the city, when such erection or repair will cost \$300 or more, is invalid so far as it relates to a building, the expenditure of \$300 as repairs on which would not be a substantial rebuilding thereof.

4. The complaint, in an action to enjoin the repairing of such building, is demurrable when it fails to show the value of the building sought to be repaired.

**A** PPEAL from circuit court, Posey county, R. D. Richardson, judge. Action by the First National Bank of Mt. Vernon and others against Richard Sarlls and others, to enjoin the repairing of a frame building. Judgment for defendants on demurrer. Plaintiffs appeal. Affirmed.

*Elijah M. Spencer and Wm. P. Edson for appellants. Gustavus Menzies and Walter S. Jackson for appellees.*

MOBRIDE, J. This case involves the validity of the second section of an ordinance of the city of Mt. Vernon entitled "An ordinance concerning the prevention of fires." The first section, the validity of which is not called in question, establishes fire limits, and prescribes the material which may be used in the erection of buildings within these limits. The second section is as follows: "§ 2. It shall be unlawful for any person to alter, repair or rebuild any frame or wooden building situated within the limit defined and prescribed by this ordinance, whenever the amount required to alter, repair or rebuild shall equal or exceed the sum of \$300. Any person violating the provisions of this section may be fined in any sum not less than \$2, nor more than \$100, with costs, and each day that workmen are employed on such building shall constitute a distinct offense." The complaint charges, in substance, that the appellees were the owners of certain real estate in Mt. Vernon, and within the fire limits prescribed by the ordinance in question, upon which they were threatening to and had commenced to rebuild and repair certain frame buildings, at a cost exceeding \$300, which had previously

been partially destroyed by fire. The appellants (plaintiffs below) are shown to be each the owners of certain other tracts of land, either adjacent to or in the immediate vicinity of the appellees' building, on which valuable buildings have been erected; and they charge that, by reason of the threatened repairing and rebuilding by the appellees, the danger of destruction by fire of their respective buildings is "greatly increased, and made more imminent, thereby diminishing the value of said plaintiffs' real estate, and increasing the rate of fire insurance thereon, to the irreparable injury and damage of the said buildings on each and all of the said pieces of real estate so as aforesaid owned by the plaintiffs, and is an obstruction to the free use by the plaintiffs of their said property, and interferes with the comfortable enjoyment thereof," etc. Prayer for an injunction. The circuit court sustained a demurrer to the complaint, and rendered judgment for costs in favor of the appellees.

Three questions are presented and discussed: (1) Will injunction lie in such a case? (2) If so, is there a misjoinder of parties plaintiff? (3) Is the section of the ordinance in question valid?

As a rule, a court of equity will not, at the suit of a city, restrain by injunction the threatened violation of an ordinance of such city regulating the erection of buildings for the purpose of greater security against damage by fire. 15 Amer. & Eng. Enc. Law, 1172; St. John v. McFarlan, 33 Mich. 72; Waupun v. Moore, 34 Wis. 450; Mayor v. Thorne, 7 Paige, 261; Manchester v. Smyth (N. H.), 10 Atl. Rep'r, 700. Nor will the courts thus interfere at the suit of an individual, when such interference is sought solely for the enforcement of the ordinance, and not because of special damage threatening the party asking such interference. Some of the authorities above cited affirm that, to warrant the application of the restraining power to prevent the erection of buildings in violation of a city ordinance, the act sought to be restrained must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance. We can see no good reason for the distinction. When it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows, in

addition, that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction. It is only when the injury is general and public in its effects, and no private right is violated in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing private suits for the violation of their individual rights. *Blanc v. Murray*, 36 La. Ann. 162; *Wood Nuis.* 645 et seq.; *McCloskey v. Kreling*, 76 Cal. 511; 18 Pac. Rep'r, 433; *Horstman v. Young*, 13 Phila. 19; *Rand v. Wilber*, 19 Ill. App. 395; *Mayor, etc., v. Hoffman*, 29 La. Ann. 651. In the case at bar it is charged by the averments of the complaint that the threatened act will be in violation of a municipal ordinance, and that it will work special and irreparable injury to the property of the petitioners. They have the right to maintain the action.

There is no misjoinder of parties plaintiff. While the appellants are shown to be the owners of separate and distinct tenements, and thus are not united in interest with each other, there is one object of common interest among all of them. They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and common interest in the relief sought authorizes them to join in the action. *Tate v. Railroad Co.*, 10 Ind. 174, and authorities there cited; *Town of Sullivan v. Phillips*, 110 Ind. 320; 11 N. E. Rep'r, 300.

The question as to the validity of the ordinance presents much greater difficulty. There can be no doubt that in this state cities possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character is recognized as a legitimate exercise of the police power, necessary to the safety of the city. *Baumgartner v. Hasty*, 100 Ind. 575; *Hasty v. City of Huntington*, 105 Ind. 542; 5 N. E. Rep'r, 559; *Clark v. City of South Bend*, 85 Ind. 276, and authorities cited in each; also *Mayor, etc., v. Hoffman*, 29 La. Ann. 651; *King v. Davenport*, 98 Ill. 305; *Wadleigh v. Gilman*, 12 Me. 403; *Salem v. Maynes*, 123 Mass. 372; *Troy v. Winters*, 4 Thomp. & C. 256; *McKibbin v. Ft. Smith*, 35 Ark. 352; *Klingler v. Bickel*, 117 Penn. St. 326; 11 Atl. Rep'r, 555. In addition to the power thus possessed, clause

32 of section 3106, Revised Statutes 1881, enumerating the powers conferred upon cities, confers express authority to establish fire limits, and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory authority is still further extended by clause 5 of the same section, and by section 3155, known as the "general welfare" clause. Counsel for appellees insist, however, that the enactment of the statutes in question served as a limitation upon the powers of the city; that the powers therein enumerated, and more, belonged to the city at common law; and that, by the statutory enumeration of certain specific powers, all others not thus enumerated are excluded. *Expressio unius, est exclusio alterius*, has no application. The statute, in so far as it enumerates common-law powers previously possessed by the municipality, is merely declaratory of the common law. But, while it is no doubt competent for the legislature, in creating such corporations, to deprive them of all common-law police power, and enact that they shall possess and exercise such only as are conferred by statute, such intention of the legislature will not be inferred simply because some of the common-law powers are enumerated, while no mention is made of others. In the exercise of these powers, they may not only prescribe where wooden buildings may and where they may not be erected, but they may undoubtedly exercise a reasonable control over the making of repairs on all buildings, whether of wood or not, and may prevent the use of inflammable or otherwise dangerous material in making such repairs. It can hardly be doubted that if the owner of a building proposed to make repairs or additions to it of such material, or in such manner, as to seriously menace the public safety or to greatly endanger adjacent property, the city authorities have ample power to interfere, and prevent the making of such repairs or additions. *City Council v. Louisville, etc., R. Co.*, 84 Ala. 127; 4 South. Rep'r, 626; *King v. Davenport*, 98 Ill. 305. They also have full power to abate nuisances, and may, if necessary, remove or compel the removal of buildings which have for any cause become nuisances, by getting in such condition that they greatly endanger the public health or safety, or the safety of adjacent property, provided the danger inheres in the building, and not simply in the use to which the building is put.

Here, also, although the statute gives ample authority, they have, without statutory authority, ample power at common law to cause the abatement of the nuisance; and, if it cannot be otherwise abated, they may destroy the thing which constitutes or creates it. *Baumgartner v. Hasty*, *supra*, and authorities cited. They may also remove, or compel the removal of, wooden buildings erected in violation of a valid ordinance; not, necessarily, because the building thus erected is a nuisance, but because its erection was in violation and defiance of the law, and its owner cannot complain when the law is vindicated by its removal.

If it were possible to so prepare wood that it would be absolutely non-inflammable, and that a building erected of it would be fire-proof and safer than one erected in the ordinary way, of stone or brick, a building thus erected of wood, in violation of a valid ordinance enacted under clause 32 of section 3106, *supra*, forbidding such erection, would be as much subject to removal or destruction by the authorities as if it were constructed of wood not thus prepared. It is manifest, therefore, that the right to remove or destroy the building thus erected in violation of an ordinance does not grow out of the fact that it is a nuisance; as a building made out of such material, if otherwise skillfully and properly constructed, would be as safe or safer than one built in the ordinary way, of stone and brick, and could not be a nuisance. As is said in *Baumgartner v. Hasty*, *supra*: "A municipal corporation has no power to treat a thing as a nuisance which cannot be one." See, also, *Wood. Nuis.* 823; *Yates v. Milwaukee*, 10 Wall. 497; *In re Jacobs*, 98 N. Y. 98. The power in such case to compel the removal of the building grows solely out of the fact that its erection was in violation of the ordinance. The discovery of a process by which wood could be made non-inflammable, and in all respects as safe to be used in the construction of buildings as stone or brick or iron, would end the common-law power of the city to prohibit the erection of wooden buildings, or its power under the general welfare clause, while under the statute that power would still exist simply because the material was wood, and not at all because it was dangerous. So with the power to remove buildings already erected. There is no express legislation on the subject, and such power as the city has are its common-law powers, reinforced by the general welfare clause of the statute. As above

shown, a building erected in violation of a valid ordinance may be removed without reference to its character; but with this exception — cities can only condemn as nuisances and compel the removal of buildings which are in themselves for some reason dangerous or hurtful.

The author of a valuable work on the law of nuisances states the law as follows: "The power to abate nuisances does not warrant the destruction of valuable property which was lawfully erected, or any thing which was erected by lawful authority. It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, any thing a nuisance which the caprice or interest of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and, even if such power is expressly given by the legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and is in defiance of it." Wood Nuis. 823. See, also, the opinion of Justice Miller in *Yates v. Milwaukee*, 10 Wall. 497. This may serve to indicate the scope of the common-law powers of the city in this direction, and the additional powers given by the statute. At common law, they are only authorized to interfere with the erection or repair of buildings far enough to prevent the doing of that which from its nature would have a tendency to create or enhance danger.

There is in this state no statute purporting to give to cities any power to prevent the repair of wooden buildings. If they have such power, it is derived either from the general welfare clause or it is an incident of their common-law police power. The section of ordinance in question, if valid, absolutely prohibits the altering or repairing of all frame or wooden buildings within the fire limits, in all cases where the cost of altering or repairing will equal or exceed \$300. It makes no difference what material is to be used in making the repairs, or what the effect may be on the building. Repairing with fire-proof material is equally prohibited with repairs from dangerous and inflammable material. A repair which would tend to diminish danger falls under the ban equally with those the tendency of which would inevitably increase it. It makes no difference whether the building was erected before or after the establishment of fire limits, or what its value is. Its



value may be trifling. It may be a mere wreck or remnant, which \$300 would practicably rebuild, or it may be valuable, worth many thousands of dollars, and the cost of the repairs, although \$300 or more, relatively insignificant. It may also be that no other building is near it to be affected or endangered. As we have heretofore said, we do not doubt that cities may exercise a reasonable control over the making of repairs of buildings, and may prevent alterations and repairs which would create nuisances. This they can do, even in the absence of statutory authority, in the exercise of the police power. And, where fire limits are established, they may doubtless prevent the repair of a wooden building within such limit, when to repair would practically be to rebuild, whether such repairs would create a nuisance or not. They cannot, however, at least without express statutory authority, enforce a general, sweeping prohibition of all repairs. Whether a statute attempting to confer such power would be constitutional we need not, of course, decide in this case; but a consideration of some of the possible effects of such an ordinance may well suggest a query of that character.

To repair a building means simply to restore it to a sound condition. The natural and probable effect of repairing, if carefully done, would be to diminish danger, instead of to increase it. Certainly, a building so much injured or otherwise out of repair as to require \$300 to repair it is more likely to endanger the public and surrounding property than if put in proper repair. If it is lawful to maintain it without repairs, how can the police power afford any justification for a refusal to allow its owner to remedy the effects of accident or decay, and restore it to a sound condition? To hold that this was a proper exercise of the police power would be to pervert entirely the use of that power, which is designed to protect society, and prevent the doing of things inimical to its well-being. Such an ordinance might in many cases compel the owner of valuable property to stand by and allow it to become valueless and a nuisance without the power to prevent it. The accidental destruction or removal of a roof which it would cost \$300 to replace might thus reduce valuable property to the condition of a mere heap of material. It is not simply a restraint on a noxious or improper use of property by its owner, but prohibits him doing that which alone will in many cases save

his property from becoming a noxious and dangerous thing. Instead of restraining him from so using it as to make it pernicious to his neighbors, it would compel him by inaction to allow it to become and remain so. It might unquestionably, in many cases, amount to a taking of the property of the citizen without due process of law, and without the sanction of that overriding necessity by virtue of which at times the rights of the individual may be sacrificed for the public good.

In *re Jacobs*, 98 N. Y. 98, Justice Earl, speaking for the court, says: "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived; and hence any law which destroys its value, or takes away any of its essential attributes, deprives the owner of his property. The constitutional guaranty would be of little worth if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein." In *Pumpelly v. Green Bay Co.*, 13 Wall. 166-177, Miller, J., says: "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the constitution. \* \* \* But the claim is made that the legislature could pass this act in the exercise of the police power which every sovereign state possesses. That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the maxim, *salus populi suprema lex est*. It is used to regulate the use of property by enforcing the maxim, *sic utere tuo ut alienum non lœdas*. Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other and, in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation and without what is commonly called 'due process of law.'

The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and, so far as it imposes restraints, the police power must be exercised in subordination thereto." In *Potter's Dwarries on Statutes*, 458, it is said that "the limit to the exercise of the police power can only be this: the legislation must have reference to the comfort, the safety or the welfare of society." In *Watertown v. Mayo*, 109 Mass. 315-319, Colt, J., says: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance." In the *Slaughter-House Cases*, 16 Wall. 36-87, Field, J., says: "Under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment." In *Coe v. Schultz*, 47 Barb. 64, a learned judge, speaking of the constitutional limitations upon the police power, says: "I am not willing to concede that the legislature can constitutionally declare an act or thing to be a common nuisance which palpably, according to our present experience or information, is not and cannot be under any circumstances a common nuisance, by the common-law definitions or common-law decisions." \* \* \* Under the mere guise of police regulation, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive.

The author of *Tiedeman's Limitations of Police Power* says: "§ 122. \* \* \* An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands, is a taking of private property without due process of law, which is inhibited by the constitution. \* \* \* One can lawfully make use of his property only in such a manner as that he will not injure another. Any use of one's land to the hurt or annoyance of another is a nuisance and may be prohibited. \* \* \* § 122a. \* \* \* But the police power of the legislature, in reference to the prohibition of nuisances, is limited to the prohibition or regulation of those acts which injure or otherwise

interfere with the rights of others. The legislature cannot prohibit a use of lands which works no hurt or annoyance to the neighbors or to adjoining property. The injurious effect of the use of the land furnishes the justification for the interference of the legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, which is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance because the legislature has declared it to be so." This author also tersely and correctly states the full scope of restrictive regulations, when confined within their proper limits, substantially as follows: "To compel every one to so use his own, and so conduct himself, as not to injure others, or infringe upon their rights."

Tried by these tests, the second section of ordinance in question, in so far as it relates to the repair of wooden buildings, is clearly invalid. It arbitrarily attempts to take from the owner of property all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property, or upon the rights of others, and applies with equal force to buildings detached and remote from all others as to those in immediate proximity to others, and not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish it. It will not be contended by any one that the establishment of fire limits will justify the condemnation and removal of wooden buildings previously constructed, simply because they are wooden buildings. Before their destruction or compulsory removal can be justified, they must become nuisances. Yet this ordinance, by forbidding repairs, would accomplish by indirection what could not be done directly. It would first compel the owner to allow it to become and remain a nuisance, and then punish him for so doing by destroying or removing his property. We have not been able to find an authority anywhere which would sustain appellants' position in this case. The case of *Brady v. Insurance Co.*, 11 Mich. 425, cited by them, holds that under the charter of the city of Detroit, which expressly authorized the enactment of an ordinance forbidding repairs to wooden buildings, an ordinance which forbade such repairs without the consent of the common

council was valid. That case in two essential particulars differed from the case at bar: (1) The charter gave express authority to enact the ordinance; and, (2) the ordinance then in question was not prohibitory, but allowed repairs when consent was first obtained of the common council. The opinion was by a divided court, Campbell, J., filing a strong dissenting opinion, holding the ordinance invalid as applied to a building erected before its enactment, notwithstanding the charter.

The case of *King v. Davenport*, 98 Ill. 305, was also a case where the charter of the city of Jacksonville conferred express authority, and the ordinance in question only forbade the building or repairing of buildings within the fire limits with other than fire-proof material. A party removed an old shingle roof from her building, and replaced it with a new shingle roof. Failing to remove it upon notice, the city marshal removed it. It was held that under the express authority conferred by the charter, the ordinance was valid. The ordinance in that case, instead of prohibiting repairs, simply prescribed the material that might be used in making repairs. These two cases are the only ones cited by the appellants upon the question of the right to prohibit repairs, although many others are cited upon the general power of the city in the establishment of fire limits, and their power to prohibit the erection of buildings. Other authorities bearing upon the right to prohibit or to regulate repairs are as follows: *Horr & Beamis on Municipal Police Ordinance* (page 214), says: "The making of ordinary repairs to existing buildings cannot be prohibited. Reshingling a building, for instance, is an ordinary repair." See, also, to the same effect, *Regina v. Howard*, 4 Ont. 377; *Brown v. Hunn*, 27 Conn. 332; *Stewart v. Com.*, 10 Watts, 307. The case of *Ex parte Fiske*, 72 Cal. 125; 13 Pac. Rep'r, 310, was a case where an ordinance prohibited the alteration or repair of wooden buildings within the fire limits without permission in writing from the fire-wardens. The court discusses at some length the provision that certain officers may grant permission to make repairs, and says: "It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger

which the framers of the ordinance sought to guard against, and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore, the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise it wantonly or for purposes of profit or oppression." The court concludes that the conferring of the discretionary power on the fire-wardens was valid, and sustained the ordinance. The case of *City Council v. Louisville, etc.*, R. Co., 84 Ala. 127; 4 South. Rep'r, 626, was a case where an ordinance prohibited repairing the roof of buildings within the fire limits with wood or other inflammable material. Like *King v. Davenport*, supra, it did not prohibit making repairs, but forbade the use of certain material in making them.

In *State v. Schuchardt*, 42 La. Ann. 49; 7 South. Rep'r, 67, it is held that a legislative mandate, authorizing a municipal corporation to prevent the reconstruction in wood of old buildings within certain limits, does not include the mandate to prevent the repairing with shingles the roofs of buildings originally covered with shingles. It will be observed, on examining these cases, with others that more or less directly bear upon the question involved, that there is wide diversity in the interpretation given to the law in the different courts. Some go so far as to deny the power to interfere at all with the making of ordinary repairs. The weight of authority, however, is clearly with those causes which recognize the power of municipal corporations to regulate the making of repairs to buildings, and treat it as a legitimate exercise of the police power; but none of them go to the extent of sustaining the power of absolutely prohibiting repairs, as is sought to be done in this case. The complaint contains no averment showing the value of the building proposed to be repaired. It is possible that the part remaining will be of small value, and that this is a case where to repair will mean a substantial rebuilding of a structure. If so, however, it would have been easy to show such fact by special averment. As it is, we are unable to say from any averment of the complaint that the proposed repairs, costing \$300 or more, may not be very small

compared with the value of that portion of the building which remains, and that to restore or rebuild it may not be to preserve valuable property, and to prevent, instead of create, a nuisance. In our opinion, the circuit court did not err in sustaining the demurrer to the complaint. Judgment affirmed, with costs.\*

1. **Municipal corporations — validity of ordinances establishing fire limits.**— Ordinances establishing fire limits and prohibiting the erection or repair of wooden buildings, if otherwise valid, are not void as a taking of property without compensation, or as an unwarrantable interference with property. *Ex parte Fisher*, 73 Cal. 125; *King v. Davenport*, 98 Ill. 305; *Louisville v. Webster*, 108 Ill. 414; *Baumgarten v. Hasty*, 100 Ind. 575; *Wadleigh v. Gilman*, 12 Me. 403; *Brady v. North Western Ins. Co.*, 11 Mich. 425; *Klingler v. Bickel*, 117 Penn. St. 326; *Knoxville v. Bird*, 13 Lea, 121.

2. **Jurisdiction of equity to enjoin enforcement of penal ordinances.**— The general rule upon this subject is thus stated in a recent decision: "When ordinances have been enacted by the proper authority, a court of equity will not interfere, by injunction, to restrain their enforcement in the appropriate courts, upon the ground that such ordinances are alleged to be illegal, or because of the alleged innocence of the party charged. Nor will that court enjoin such proceedings under the ordinance for the purpose of determining the validity of the ordinance in a court of law, when, as in this case, the defendant has an adequate remedy at law." *Poyer v. Village of Des Plaines*, 123 Ill. 111; S. C., 20 Ill. App. 30. This view is supported by the following cases: *Burnett v. Craig*, 30 Ala. 135; *Moses v. Mayor, etc.*, 52 Ala. 193; *Medical Institute v. Hot Springs*, 34 Ark. 559; *Pierce v. City of Little Rock*, 39 Ark. 412; *Phillips v. Stone Mountain*, 61 Ga. 336; *Garrison v. City of Atlanta*, 68 Ga. 64; *Yates v. Village of Batavia*, 79 Ill. 500; *Hamilton v. Stewart*, 59 Ill. 330; *Devron v. First Municipality*, 4 La Ann. 11; *Levy v. City of Shreveport*, 27 La. Ann. 620; *West v. Mayor, etc.*, 10 Paige, 539; *Davis v. American Society*, 75 N. Y. 362; S. C., 2 Daly, 81; *Cohen v. Commissioners of Goldboro*, 77 N. C. 2; *Gaertner v. Fond du Lac*, 34 Wis. 497; *Torpedo Co. v. Clarendon*, 19 Fed Rep'r, 231.

The following cases are more or less opposed to the general rule above stated: *Railroad Co. v. Mayor, etc.*, 54 N. Y. 159; *Ward v. Brooklyn*, 14 Barb. 425; *Mayor v. Radeke*, 49 Md. 217; *Page's Case*, 34 Md. 564; *Shinkle v. Covington*, 83 Ky. 420.

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## GERMAN INS. CO. v. FAIRBANK.

(Supreme Court of Nebraska, Sept. 15, 1891.)

1. **FIRE INSURANCE. CONDITION AGAINST INCUMBRANCES. DIVISIBILITY OF COVENANTS.** Where an insurance policy covers a dwelling and different classes of personal property, describing them separately, and specifies distinct and separate amounts on the dwelling and each kind of personalty, the execu-

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\* Reported in 28 N. E. Rep'r, 434.

tion of a mortgage on the real estate, in violation of a condition against subsequent incumbrances on any of the property insured, is no defense to an action for the loss of the personalty.

2. When a policy is taken out on different classes of personal property for separate and distinct amounts, the violation of a condition of the policy against incumbrances, by the execution of a chattel mortgage on one class of property, will not preclude a recovery upon the policy for the destruction of the property of another kind, not incumbered.

3. LIMITATIONS IN POLICY. "SIX MONTHS AFTER LOSS." Where a policy of insurance requires proofs to be furnished within thirty days, and the action to be commenced within six months after the loss, and it is further provided that the company will pay the loss ninety days after the notice and due and satisfactory proofs of the same shall have been made by the assured and received at the company's home office, held, that the cause of action did not accrue before the expiration of ninety days after proofs of loss are received; and an action brought on the policy within six months from that time is not barred.

4. PROOFS OF LOSS. In an action upon a policy, which provides that the insured should furnish proofs of loss within a specified time after the loss occurred, it is necessary for the plaintiff to prove upon the trial that the proofs were made, or that the same were waived by the company.

**E**RROR to district court, Adams county, Gaslin, judge. Action on an insurance policy by Loren Fairbank against the German Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

*Jas. R. Wash and Adams, Lansing & Scott* for plaintiff in error. *Chas. Kilburn and Chas. H. Tanner* for defendant in error.

**NORVAL, J.** This is a suit upon a policy of insurance against loss or damage by fire, lightning, tornado and wind-storms, to recover for the loss of a cow covered by the policy. There was judgment in the court below for the plaintiff in the sum of \$32.50 and costs. The case, as made by the plaintiff, was that on the 12th day of January, 1838, the cow was violently blown upon a barbed wire fence and killed. There is no conflict in the evidence, either as to the manner of the loss or the amount of the damages. The insurance company contends that the plaintiff cannot recover because he has violated certain stipulations of the policy. The policy was for the amount of \$1,150, of which \$450 was on dwelling, household furniture, beds and bedding, wearing apparel and sewing-machine; \$300 was on horses and cattle, not exceeding \$100 on any one horse, and not exceeding \$30 on any



one cow ; and the balance of the risk was upon other personalty. The policy upon which the action was brought provides, among other things, that, "if there is or shall be other prior, concurrent or subsequent insurance (whether valid or not) on said property, or any part thereof, without the company's consent hereon ; or if said buildings, or either of them, is or shall become vacant or unoccupied, or if the hazard shall be increased in any way ; or if the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or any change takes place in the title, use, occupation or possession thereof whatever ; or if any foreclosure proceedings shall be commenced ; or if the interest of the insured in said property, or any part thereof, now is or shall become any other or less than a perfect legal title and ownership, free from all liens whatever, except as stated in writing hereon ; or if the buildings, or either of them, stand on leased ground or land of which the assured has not a perfect title ; or if this policy shall be assigned without the written consent hereon, then and in every such case this policy shall be absolutely void." One of the defenses presented by the answer is that the insured, in violation of the above condition of the policy, after the same was issued, but before the loss, and without the knowledge and consent of the company, executed and delivered two mortgages upon the farm on which is situated the dwelling covered by the policy. On the trial the plaintiff in error offered these mortgages in evidence, which were excluded by the court. This ruling is assigned as error.

The precise question here presented was before the court in Insurance Co. v. Schreck, 27 Neb. 527 ; 43 N. W. Rep'r, 340. It was there held that where an insurance policy covers a dwelling and various classes of personal property, describing them separately, and specifies different and separate amounts on the dwelling and each kind of personalty, the execution of a mortgage on the real estate in violation of a condition against subsequent incumbrances on any of the property insured is no defense to an action for the loss of the personalty not incumbered. The authorities cited in the brief of the defendant in error in that case sustain the same doctrine. We are satisfied with the reasoning of the opinion, and the decision is adhered to. The policy having specified separate and distinct amounts upon the different sub-

jects of insurance, the contract is severable, and a breach of a condition of the policy against incumbrances could only affect that class of property which was covered by the incumbrance. The execution of the mortgages upon the lands, therefore, only avoided the policy so far as it covered the buildings, and did not in any manner affect the insurance upon the cattle. The plaintiff in error, for the purpose of showing that the insured had violated the above provisions of the policy, offered in evidence a chattel mortgage executed on January 18, 1887, by the defendant in error to P. H. Passey, administrator, covering several head of horses. The mortgage was ruled out by the court, and an exception was taken by the plaintiff in error. There is no claim that there had ever been any incumbrance, during the life of the policy, upon the cow that was killed, or ever upon any of the cattle owned by the insured. The ruling of the trial court is within the decision in *Insurance Co. v. Schreck*, supra. The policy in that case, like the one before us, was not upon specific personal property. There some of the personalty insured had been mortgaged subsequent to the execution of the policy. Chief Justice Reese, in the opinion, says: "Had the contract of insurance been upon specific personal property, it is possible that the defense presented would have been available. However, that question is not before us. But we are quite clear that the transfer of the legal title to the insured property, either by mortgage or sale, would avoid the policy so far only as that particular property was concerned during the time of the existence of the title in the purchaser or mortgagee, and to that extent only could the sale or mortgaging of the property under the provisions of this policy be a successful defense." No specific stock is described in the contract, but it simply specifies \$300 on horses and cattle, limiting the amount on each animal. By the terms of the policy, if the loss on cattle equaled \$300, it is perfectly clear that the insured would have been entitled to recover that sum. Had he sold the horses, it would not have affected the insurance on the cattle. The fact that they were incumbered did not affect or render less valuable the title of the insured in the cattle, nor was the risk on the cattle thereby increased. It cannot be successfully claimed that the hazard of wind-storms was increased by the incumbrance of the property. There was no error committed in refusing to allow the chattel mortgage to be received

in evidence. There is another reason why the chattel mortgage was properly excluded. The answer alleges that the insured executed a mortgage "on January 18, 1887, to P. H. Passey for the sum of \$250." The chattel mortgage offered in evidence was made by Warren Fairbank and Loren Fairbank to P. H. Passey as administrator, and not to him in his individual capacity, as alleged in the answer. There was, therefore, a variance between the allegations and the instrument offered, both as to the name of the mortgagor and mortgagee. The proofs must correspond with the issues made by the pleadings.

It is insisted that the action is barred by the terms of the policy. It contains this provision: "It is mutually agreed that no suit or action against this company upon this policy shall be sustained in any court of law or equity unless commenced within six months after the loss or damage shall occur, and, if any suit or action shall be commenced after the expiration of said six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." The petition alleges, and the proofs show, that the loss occurred January 12, 1884. The suit was begun before the justice of the peace September 27, 1888, or eight months and a half after the cow was killed. If the condition of the policy above quoted stood alone, and was within the contemplation of the parties when the contract was entered into, then, doubtless, the failure of the plaintiff to commence his action within six months after the loss would operate as a bar to the action. But a contract of insurance, like all other contracts, must be construed so as to give effect, if possible, to all its provisions. This policy provides that written notice of the loss or damage must be immediately given, and within thirty days the claimant must furnish proofs thereof. It is also stipulated that "the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid ninety days after notice and due and satisfactory proofs of the same shall have been made by the assured and received at the company's home office at Freeport, Ill." It will be observed that by the above condition of the policy the plaintiff in error did not become liable to pay the loss until ninety days after the making of the proofs of loss. The money was not due, and the holder

of the policy could not have lawfully demanded payment, until that time had elapsed. No suit, therefore, could have been commenced prior to the expiration of ninety days after the loss, and it is well settled that the period of limitation will not commence to run until the cause of action accrues. The fair and reasonable interpretation of the provisions of the policy, when construed together, is that the limitation of six months did not begin to run from the date of loss, but from the time the suit could have been brought. It does not appear in evidence when the proofs were made, nor the fact that they were ever furnished; but, as suit was instituted within six months from the time it could have been commenced, had proofs been made on the day the loss occurred, the action was not barred. This construction is well sustained by the authorities. *Ellis v. Insurance Co.*, 64 Iowa, 507; 20 N. W. Rep'r, 782; *Miller v. Insurance Co.*, 70 Iowa, 704; 29 N. W. Rep'r, 411; *McConnell v. Association*, 79 Iowa, 757; 43 N. W. Rep'r, 188; *Matt v. Association (Iowa)*, 46 N. W. Rep'r, 857; *Hay v. Insurance Co.*, 77 N. Y. 241; *Killips v. Insurance Co.*, 28 Wis. 472.

The remaining ground for reversal is that there is no evidence that the plaintiff ever made proofs of loss. The petition alleges that they were furnished to the company, which allegation is denied by the answer. No testimony was produced on the trial by either party on that branch of the case. Quite likely the omission was an oversight on the part of the plaintiff. The policy requires that proof be made within thirty days after the loss, and it was incumbent upon the plaintiff to establish on the trial that this stipulation was complied with, or that the company waived the same. If the plaintiff relies upon a waiver of the provision, it should be pleaded. For the failure to prove on the trial that proofs of loss were made, the judgment is reversed, and the cause remanded for further proceedings.

The other judges concur.\*

#### FIRE INSURANCE—PROOFS OF LOSS.

1. *Procuring certificate of magistrate or notary.*—Where the policy requires the assured to procure the certificate of a magistrate or notary, nearest the fire, not concerned in the loss or related to assured, stating that he has examined the circumstances and believes the loss to be without fraud, the

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\* Reported in 49 N. W. Rep'r, 711.

condition is reasonable, and must be complied with, if possible. *Kelly v. Sun Fire Office*, 141 Penn. St. 10; 21 Atl. Rep'r, 447.

2. **When nearest notary an employe of company — refusal to certify.**— Where the nearest notary was in the employ of the company, and refused to furnish a certificate of actual loss without fraud, as required by the policy, and the certificate was furnished by another notary, Civil Code of California, section 2637, providing that the insured should "furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified," did not require plaintiff to send, to the company, evidence that the nearest notary was in their employ. *Noone v. Transatlantic Ins. Co.*, 88 Cal. 152; 26 Pac. Rep'r, 103.

3. **Including articles not belonging to assured — fraud.**— The fact that assured in her proofs of loss included some articles that were not her property did not invalidate the policy, where no fraud was intended, and she supposed the articles were included in a clause of the policy. *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646; 48 N. W. Rep'r, 296.

4. **Assured bound by valuation made in his proofs.**— See *Morley v. Liverpool & London & Globe Ins. Co.*, 85 Mich 210; 48 N. W. Rep'r, 502.

5. **Waiver of defects or delay.**— Where proofs of loss are sent to an insurance company immediately after a fire, and are retained by it for nearly two months, without any objection being made to them, it is a question for the jury whether the company thereby waived any defects in them or not. *Davis Shoe Co. v. Kattanning Ins. Co.*, 138 Penn. St. 73; 20 Atl. Rep'r, 838. Where the insurer, in response to notice of loss, sent to the insured a blank, apparently designed to be used in making proof of loss, and the insured so used it, filling it up with all the particulars of the loss of which the blank admitted, and sent it to the insurer, who returned it without objecting to its sufficiency, the insurer will be held to have waived the objection that it was not itemized with the detail required by the policy. *Bromberg v. Minnesota Fire Assn.*, 45 Minn. 318; 47 N. W. Rep'r, 975.

6. **Waiver of formal proofs.**— In an action upon an insurance policy, it appeared that an adjuster of the company spent several days with the assured's son and agent in making a list of the personalty destroyed, and the two employed a builder to estimate the value of certain buildings, and referred to an arbitrator the value of a dwelling upon which they could not agree. Held that, if the adjuster's conduct would induce an honest belief that the proofs then being made were all the company required, and the insured did so believe, the jury might find that formal proofs were waived. *Gristock v. Royal Ins. Co.*, 84 Mich. 161; 47 N. W. Rep'r, 549. See, also, *German Ins. Co. v. Gray*, 2 Am. R. R. & Corp. Rep. 459, and note, p. 475.

7. **Unreasonable delay.**— A petition on a fire policy containing a stipulation that the assured shall render a particular account of the loss under oath, as soon as possible after its occurrence, is insufficient when it avers a general compliance with all the conditions of the policy, and also that the loss occurred in August, and that proof of it was furnished in December, for such unexplained delay is unreasonable, and not a compliance with the policy. *Baker v. German Fire Ins. Co.*, 124 Ind. 490; 24 N. E. Rep'r, 1041.

8. **Proofs of loss as evidence of value.**— The proof of loss made to the company after the fire is not evidence of the value of the property; and, where

such proof is the only evidence of the value of the property, there is nothing for the jury to decide. *Cascade Fire, etc., Ins. Co. v. Journal Pub. Co.*, 1 Wash. 452; 25 Pac. Rep'r. 331.

9. *Proofs by partnership—giving individual names.*—Where insurance is issued to a copartnership in the firm-name, proof of loss in such name is sufficient, though it does not give the name of any of the partners except one who signed the proof with the firm-name, and added thereto his individual signature, with the word "treas." following it. *Karelsen v. Sun Fire Office*, 122 N. Y. 545; 25 N. E. Rep'r, 921.

## ST. NICHOLAS BANK OF NEW YORK V. STATE NAT. BANK.

(Court of Appeals of New York, June 2, 1891.)

1. **BANKS AND BANKING. COLLECTIONS. LIABILITY OF COLLECTING BANK FOR DEFAULTS OF ITS SUB-AGENTS.** A bank which sends a draft received for collection to sub-agents who collect it, and remit a draft on third persons for the amount, which the bank then sends to another bank for collection, is liable to the owner of the original draft, where the sub-agents' draft is not paid, and they in the meantime become insolvent.

2. **DECISION OF ANOTHER STATE AS TO THE COMMON LAW NOT BINDING.** The decisions of the supreme court of Tennessee, as to what is the common law as applied to drafts sent to banks for collection, are not binding on the courts of New York, even in actions on such contracts made in Tennessee.

3. **INTERSTATE LAW. COLLECTIONS.** Where a draft was sent to a bank in pursuance of a general contract between it and the owners, who reside in another state, that it should collect paper sent it, for an agreed compensation, it cannot be held, in the absence of any evidence, that the contract to collect the particular draft was made in the state where the bank is situated.

4. Nor can the contract be regarded as subject to the law of that state, on the ground that it was to be performed there, when the draft was to be collected in a third state, and paid to the owner in the state of his residence.

**A** PPEAL from supreme court, general term, first department. This action was brought to recover the proceeds of a draft for \$473.57 sent for collection by the plaintiff to the defendant, and paid to the defendant's correspondents. The trial resulted in the direction of a verdict for the plaintiff for the amount demanded. Upon appeal to the general term, the judgment entered upon the verdict was reversed, and a new trial ordered. From the order of reversal the plaintiff appealed to this court. There is no controversy as to the facts, which for the most part were set forth in a stipulation read upon the trial. They may be summarized as follows: The plaintiff is a corporation organized

under the laws of the state of New York, and engaged in the business of banking in the city of New York; and the defendant is a corporation organized under the national banking act, and doing business in the city of Memphis. For two years prior to the 18th day of November, 1884, the plaintiff had been accustomed to send checks, notes and drafts to the defendant for collection, including such as were drawn upon persons residing at a distance, in the state of Texas and elsewhere. The commercial paper was inclosed in letters, consisting of printed forms, filled out by the insertion in writing of the date, the name of the defendant's cashier, and a description of the inclosure. The checks and drafts were collected by the defendant, and the proceeds were remitted to the plaintiff, less one-fourth of one per cent, the defendant's commission, and the expense incurred in making distant collections. On November 10, 1884, the plaintiff was the owner and holder of a check for \$473.57 dated November 6, 1884, drawn upon the City National Bank of Dallas, Tex., by A. D. Aldridge & Co., and payable to the order of Henry Levy & Son. This check was indorsed by the plaintiff to the defendant for collection, and was sent to the latter in the usual course of business. The defendant received the check on November 13, 1884, and on that day indorsed it for collection, and forwarded it by mail to the firm of Adams & Leonard, at Dallas, Tex. They were at the time, and had been for many years, bankers in good standing at Dallas, and the correspondents of the defendant. They received the check on November 17, 1884, and on that day duly presented it for payment to the bank upon which it was drawn, and it was immediately paid, and the proceeds were received by them. They then remitted to the defendant a sight draft for the amount collected, drawn by them upon Jemison & Co., of the city of New York. This draft was sent by the defendant for collection to the First National Bank of New York, and on November 24, 1884, was presented to Jemison & Co., who, in the meantime, had suspended payment. The draft was accordingly protested, and returned to the defendant. Thereupon the defendant, on November 28, 1884, mailed the protested draft to the plaintiff, and the plaintiff refused to accept it. Adams & Leonard had failed in business before the draft on Jemison & Co. was presented for payment. The only evidence offered by the

defendant in opposition to these facts was proof of a decision of the supreme court of Tennessee, in the case of *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101, which will be referred to in the opinion.

*Chas. E. Hughes* for appellant. *A. Walker Otis* for respondent.

EARL, J. (after stating the facts as above.) The rule has long been established in this state that a bank receiving commercial paper for collection, in the absence of a special agreement, is liable for a loss occasioned by the default of its correspondents or other agents selected by it to effect the collection. *Allen v. Bank*, 22 Wend. 215; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Naser v. Bank*, 116 N. Y. 498; 22 N. E. Rep'r, 1077. And the same rule prevails in some of the other states, in the United States supreme court and in England. *Titus v. Bank*, 35 N. J. Law, 588; *Wingate v. Bank*, 10 Penn. St. 104; *Reeves v. Bank*, 8 Ohio St. 465; *Tyson v. Bank*, 6 Blackf. 225; *Simpson v. Waldby* (Mich.), 30 N. W. Rep'r, 199; *Mackersy v. Ramsays*, 9 Clark & F. 818. In such a case the collecting bank assumes the obligation to collect and pay over or remit the money due upon the paper, and the agents it employs to effect the collection, whether they be in its own banking-house or at some distant place, are its agents, and in no sense the agents of the owner of the paper. Because they are its agents, it is responsible for their misconduct, neglect or other default. Here, when this money was received by *Adams & Leonard*, the defendant's agents, it was, in law, received by it, and it became absolutely bound to pay or remit the same to the plaintiff. It is difficult to see upon what principle the defendant could be held liable if *Adams & Leonard*, its agents, had carelessly failed to collect the draft, or had collected it, and then purposely misappropriated the proceeds thereof, and yet not liable for their failure to pay over the proceeds in consequence of their unexplained insolvency.

Upon what principle can the defendant be held liable for one default of its agents, and not for every default? That the insolvency of the sub-agent in such a case does not shield the collecting



agent from responsibility for the loss has been decided in several cases quite analogous to this. *Reeves v. Bank*, *Simpson v. Waldby*, and *Mackersy v. Ramsays*, *supra*; and *Bradstreet v. Everson*, 72 Penn. St. 124. It is not needful now to vindicate the principle upon which these cases rest, as that has been sufficiently done by learned judges writing the opinions therein. They are well supported by many analogous cases in other branches of the law and it is believed they lay down the best and safest rule and subserve the wisest commercial policy. The case of *Indig v. Bank*, 80 N. Y. 100, is not opposed to these views. There the defendant received a note for collection which was payable at the Bank of Lowville, and it sent the note directly to the bank for payment, which on the next day sent a draft for the amount of the note to the defendant, and failed before the draft reached its destination and it was held that the loss did not fall upon the defendant. That conclusion was reached by holding that the Lowville bank was not the agent of the defendant, but that the defendant was in the same position as if it had sent the note to some agent and he had received the proceeds thereof and had then bought a draft on New York of the Lowville bank for the amount and the bank had then failed before the draft was paid. The defendant there would have been held liable if the Lowville bank had been its agent for the collection of the note. *Briggs v. Bank*, 89 N. Y. 182. After *Adams & Leonard* had received payment of the draft, they drew a draft upon *Jemison & Co.*, for the amount and sent that to the defendant for the purpose of discharging their obligation to the defendant. That draft was not made for the purpose of remitting the proceeds of the collection to the plaintiff and was not used by the defendant for that purpose. It sent the draft to the First National Bank of New York for collection, intending afterward to remit the proceeds of the collection to the plaintiff in some other way. After *Adams & Leonard* and *Jemison & Co.*, had failed, it sent the worthless draft to the plaintiff. By so doing it did not discharge its obligations to the plaintiff. If *Adams & Leonard* had purchased a draft of the Dallas bank and sent that to the plaintiff, or if it had sent the draft to the defendant and the latter had then sent it to the plaintiff, then, according to the doctrine of *Indig v. Bank*, the defendant would not have been responsible for the

continued solvency of the Dallas bank. That case was much discussed here, and there was much difference of opinion about it. It is a border case and its doctrine should not be much extended.

The defendant, however, claims that the contract with the plaintiff is to be treated as a Tennessee contract and that by the law of that state it cannot be made liable for this loss. Upon the trial, for the purpose of showing the law of that state, it put in evidence a decision of the supreme court in the case of *Bank of Louisville v. First Nat. Bank of Knoxville*, 8 Baxt. 101. In that case a bill of exchange, payable at the First National Bank of Knoxville, was sent by a New York bank to the Bank of Louisville for collection. It was transmitted by the Louisville bank to the Knoxville bank, was received by the latter, and was subsequently returned unpaid. The cashier of the Knoxville bank delivered the bill to a notary public in good repute at the time, who failed to protest it, by reason of which the right of action against the drawer was lost. The Louisville bank paid the amount of the bill to the New York bank, and then brought suit to recover against the Knoxville bank, and failed. It was held that "where a bank receives a bill of exchange for collection, payable at a distant place, its liability is discharged by transmitting the same, in due time, to a suitable and responsible bank or other agent, at the same place of payment; and in such case the principal's assent to the employment of a sub-agent is implied," and that "if a debt be lost by negligence of an agent to whom a bill of exchange is sent for collection, the principal or home bank (having complied with its duty, and not being liable to the holders) cannot by voluntarily discharging the claim of the payee, maintain an action on the case for negligence against the sub-agent. Such right accrues only to the holder or payee of the bill, under the circumstances." That decision was not based upon any statute law, but upon the principles of the common law, supposed to be applicable to the facts of the case. It did not make or establish law, but expounded the law, and furnished some evidence of what the law applicable to that case was — evidence which other courts might or might not take and receive as reliable and sufficient; and even the same court upon fuller discussion and more mature consideration, might in some subsequent case, refuse to take the same view of the law. There is no common law peculiar to Tennessee. But the common

law there is the same as that which prevails here and elsewhere, and the judicial expositions of the common law there do not bind the courts here. The courts of this state, and of other states, and of the United States, would follow the courts of that state in the construction of its statute law. But the courts of this state will follow its own precedents in the expounding of the general common law applicable to commercial transactions, and so it has been repeatedly held. *Faulkner v. Hart*, 82 N. Y. 413; *Swift v. Tyson*, 16 Pet. 1; *Oates v. Bank*, 100 U. S. 239; *Ray v. Gas Co.*, 20 Atl. Rep'r, 1065 (decided in Pennsylvania supreme court, January 12, 1891). We must, therefore, hold that the obligation resting upon the defendant was that which the principles of the common law as expressed by the courts of this state placed upon it. If it be said that the contract between these parties was made in view of the common law, then we must hold that it was the common law as expounded here.

But it cannot be maintained that the contract between these parties was a Tennessee contract. It is by no means clear, even that it can be held that the contract was made there. It does not certainly appear where it was made. It cannot be said that a new contract was made every time a piece of paper was sent by the plaintiff to the defendant for collection. There was a general contract between the parties, which was either created by some negotiation, or which grew out of the course of business between them, that the defendant should collect the paper sent to it for the compensation to be allowed. If that contract was made by correspondence, the plaintiff making a proposition by mail, and the defendant accepting it by mail, then, when the acceptance was put in the mail at Memphis, the contract was complete, and had its inception there. If the proposition came from the defendant, and was accepted in the same way in New York, then it would have to be treated as made in New York. In the absence of more proof than we have here, it cannot be assumed that this contract was made in Tennessee. Nor is this to be regarded as a Tennessee contract, for the reason that it was to be performed there, so that the defendant can claim that its obligations and interpretations are to be governed by Tennessee law. We cannot perceive how any substantial part of the contract was to be performed in Tennessee. The defendant was to collect this draft in

Texas, and pay its proceeds, less its compensation, to the plaintiff in New York, and so the contract was to be performed in Texas and New York. Adams & Leonard collected the draft for the defendant in Texas, and sent it their own draft on Jemison & Co. This draft the defendant sent to the First National Bank of New York for collection and credit. If the draft had been paid, then the defendant would have had credit for the amount with that bank, and would probably have sent its own draft on that bank to the plaintiff for the amount of the collected draft, less its compensation, and that bank would have paid that draft on presentation, and thus the proceeds of the collected draft would finally have reached the plaintiff, and the obligation of the defendant would then, and not until then, have been fully discharged. So, always, the defendant, having collected a draft sent to it by the plaintiff, and received the proceeds thereof, would, in the ordinary course of business, discharge its obligation to the plaintiff by payment through its corresponding bank in New York. Therefore, we think it is quite clear that this contract cannot, in any view, be treated as a Tennessee contract, subject in any way to the law of that state. Our conclusion, therefore, is that the order of the general term should be reversed, and the judgment entered upon the verdict affirmed, with costs. All concur.\*

#### BANKS AND BANKING — RECENT DECISIONS.

1. *Checks. Effect of certified check.*—One taking a certified check in the ordinary course of business does not assume the risk of the solvency of the bank upon which it is drawn, and there is no release of the drawer in the absence of an express or implied agreement to that effect. *Born v. First Nat. Bank*, 123 Ind. 78; S. C., 24 N. E. Rep'r, 173. The delivery of a certified check is not payment. *Beckford v. Bank*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Bank v. Rotge*, 28 La. Ann. 933; *Andrews v. Bank*, 9 Heisk. 211; *Tied. Com. Paper*, § 456.

*Presentation — failure of bank — discharge of drawer.*—The drawer of a check in Philadelphia upon a city bank in favor of a payee residing in the city is discharged from liability by the failure of the payee to present the check for three days, during which time the bank fails. *National State Bank v. Weil*, 141 Penn. St. 457; S. C., 21 Atl. Rep'r, 661.

*Delivery of check not payment.*—A check on a bank is not payment, but is only so when the money is received on it; and there is no presumption that a creditor takes a check in absolute payment arising from the mere fact that he accepts it from his debtor. *National Bank of Commerce v. Chicago, etc., R. Co.*, 44 Minn. 224; S. C., 46 N. W. Rep'r, 342. Where goods are sold for cash

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\* Reported in 27 N. E. Rep'r, 349.

on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods, even from an innocent subvendee for value, unless he has been guilty of such negligence or laches as would equitably estop him from so doing. *Id.*

But where a depositor, having sufficient funds standing to his credit, tenders his check on his bank in payment for negotiable paper which it has for sale, and the bank accepts the check, and charges it against the deposit, and delivers over the paper, the acceptance of the check amounts to payment, and the depositor is a purchaser of the paper for value, the antecedent debt of the bank to him being to that extent extinguished.

*Presumed to be drawn on bank where dated.*—Checks dated at "LaFayette, Indiana," and drawn on the "First National Bank," support an allegation that they were drawn upon the "First National Bank of LaFayette, Indiana." *Culver v. Marks*, 122 Ind. 554; S. C., 23 N. E. Rep'r, 1086.

*When presentation unnecessary.*—Presentation of a check to the bank and notice of non-payment is not necessary, when the drawer has no funds on deposit for its payment at the time when it should be presented, or, having funds, withdraws them, or where, by agreement of the parties, the check is not to be presented. *Id.*

*Effect to transfer legal title to funds.*—Where a master in chancery, who has deposited in bank in a separate account a sum of money held by him as master for the benefit of one person, gives such person a check for the entire sum, the delivery of the check transfers to the payee the legal title to the deposit, and an indorsement and delivery of the check by the payee, before the fund has been garnished by his creditors, transfers title to the indorsee, as against the creditors. *Hemphill v. Yerkes*, 132 Penn. St. 545; S. C., 19 Atl. Rep'r, 342. The holder or payee of a check cannot in his own name maintain an action against a drawee, when the check has not been accepted. *Boettcher v. Colorado Nat. Bank*, 15 Col. 16; S. C., 24 Pac. Rep'r, 582; S. P., *Attorney-General v. Insurance Co.*, 71 N. Y. 335; *Duncan v. Berlin*, 60 N. Y. 151; *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Carr v. Bank*, 107 Mass. 45; *Mining Co. v. Brown*, 124 U. S. 385.

Where executors, who are invested with discretion to distribute an estate among the testator's children in such manner and at such times as in their judgment will best promote the children's interests, deposit money in a bank to the credit of the estate, and afterward give an ordinary check to a child in part distribution, the child does not receive title so as to enable a receiver, appointed in proceedings supplementary to an execution against him, to sue the bank before the check is presented for payment, since the deposit of money in a bank merely makes the bank a creditor of the depositor, and the giving of an ordinary check neither operates as an assignment of the fund, nor gives the drawee any right of action against the bank. *O'Connor v. Mechanics' Bank*, 124 N. Y. 324; S. C., 26 N. E. Rep'r, 816.

Under the Pennsylvania act of May 10, 1881 (P. L. 17), which provides that no person shall be charged as an acceptor on an order drawn for the payment of money unless his acceptance shall be in writing, no action can be maintained against a bank, on an unaccepted order drawn on it by a depositor, though the

order is for the entire balance due him, and amounts to an equitable assignment of the fund. *Maginn v. Dollar Savings Bank*, 181 Penn. St. 863; S. C., 18 Atl. Rep'r, 901.

2. *Collections. Insolvency of collecting bank — conflicting claims to proceeds of collection.*—Certain bankers, having collected a draft for plaintiff, remitted to him on March 17 by exchange drawn by them on New York. This was presented on March 22, and payment refused, as these bankers had failed on the 18th. It was shown that it would have been paid if presented on the 18th. Held that, as plaintiff did not receive it until March 19, the delay in presenting it does not prejudice his right to recover against the receiver of such bankers. *Kinney v. Paine*, 68 Miss. 258; S. C., 8 So. Rep'r, 747. The drawer of the draft was indebted to the bankers on book account, and after their assignment plaintiff filed a bill to enforce a trust in his favor on this debt. Certain creditors had bought all the assets of the bankers, and claimed to be *bona fide* purchasers of the debt of such drawer. Held, that their purchase had no effect on plaintiff's rights. *Id.*

The drawers of a draft deposited with a bank for collection, and by it forwarded to a correspondent bank, which collects it and credits the proceeds to the forwarding bank, are entitled to recover the amount from the collecting bank (it being still in the hands of that bank) as against the receiver of the forwarding bank, which was insolvent, and known to be so by its officers, when it received the draft, and suspended payment before the proceeds were withdrawn from the collecting bank. *Importers & Traders' Bank v. Peters*, 128 N. Y. 273; S. C., 25 N. E. Rep'r, 819.

2. That the drawers of the draft included it in their claim against the insolvent bank, presented to and allowed by the receiver, does not affect their right to recover the proceeds of the draft from the collecting bank, as against the receiver, when it appears that, on discovering the facts constituting the fraud on the part of the officers of the insolvent bank, they paid back to the receiver the dividends already received on the draft, and refused to accept any further dividends on it. *Id.*

3. That the collecting bank collected a number of other drafts, forwarded by the insolvent bank at the same time, and credited all the proceeds to its account, does not prevent plaintiffs from recovering the proceeds of their draft, as against the receiver, the owners of the other drafts not claiming the fund. *Id.*

*Negligence in making collection — condonation.*—Plaintiff deposited with defendant, a bank, his own check on another bank. Defendant, instead of collecting the check, exchanged it for a bank-draft, which was not paid, and then notified plaintiff that it held the draft subject to his order. Plaintiff thereupon, with knowledge of all the facts, directed defendant to hold the draft for a few days, and, if not paid, send it to him. Held, that plaintiff had condoned defendant's negligence, and could not hold it liable for not collecting his check. *Hazlett v. Com. Nat. Bank*, 132 Penn. St. 118; S. C., 19 Atl. Rep'r, 55.

3. *Deposits and depositors. Application of deposits to debt of depositor — rights of third parties — notice.*—In a suit against a bank for the amount of certain checks drawn by a firm of millers in plaintiff's favor, and which, although there were moneys to the drawer's credit, were refused payment because the bank retained such moneys for the discharge of a debt about to fall due to it—

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self, an allegation that such moneys were the proceeds of wheat sold to the drawers by plaintiff, and were deposited for the payment of such checks, and for no other purpose, was not sufficient to charge the bank as a trustee, in the absence of an averment that it was a party to the agreement, or had notice thereof. *Boettcher v. Colorado Nat. Bank*, 15 Col. 16; S. C., 24 Pac. Rep'r, 583.

A bank, in which a certified check is deposited by one to the credit of another for the special purpose, of which the bank has notice, of meeting a check drawn by the latter in favor of the depositor of the certified check and indorsed by such depositor, has no right to apply any part of the amount of the certified check to a debt due it from the person to whose credit it is deposited. *Straus v. Tradesmen's Nat. Bank*, 122 N. Y. 379; S. C., 35 N. E. Rep'r, 372.

Upon an assignment for the benefit of creditors, a bank cannot set off a deposit to the credit of the assignor against a note held by it against him, but not due at the time of the assignment. *Outman v. Batavian Bank*, 77 Wis. 501; S. C., 46 N. W. Rep'r, 881. In *Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411; S. C., 11 Sup. Ct. Rep'r, 118, circumstances are reviewed which were held sufficient to give notice to a bank that funds deposited by an agent in his own name were the property of the principal, so as to prevent their application to an overdraft of the agent.

*Suit by principal to recover funds deposited by agent in his own name.*—A principal may maintain a bill in equity against a bank to recover moneys deposited therein by his factor as the proceeds of property consigned to him for sale, since the legal title thereto is in the factor and the principal could not have an action at law. *Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411; S. C., 11 Sup. Ct. Rep'r, 118.

4. *Insolvency. Receiving deposits when insolvent—criminal liability.*—The acts of the eighteenth general assembly of Iowa, chapter 153, provide that no bank or firm engaged in banking, shall accept or receive on deposit any money when such bank or firm is insolvent, and any officer of such bank, or member of such firm, who receives a deposit, knowing of such insolvency, shall be guilty of a felony, etc. An indictment under this statute alleged that defendants, a firm engaged in banking, were, on a date specified, insolvent, and, being so, that they accepted and received on deposit a certain sum of money. Held, that evidence is admissible that the deposit was received by the cashier of defendants' bank during their absence, it being immaterial whether they did the act constituting the offense in person or by an agent. *State v. Calwell*, 75 Iowa, 432; S. C., 44 N. W. Rep'r, 700.

*What is a deposit—certificates of deposit.*—A certificate of deposit, signed by the cashier of defendants' bank, certifying that a certain person had deposited therein a named sum, payable to her own order, in current funds, on return of the certificate properly indorsed, is evidence of a deposit, within the meaning of such statute and not of a loan. *Id.*

*What constitutes insolvency within the act.*—A bank or firm, etc., engaged in banking, is insolvent, within the meaning of such statute, when it is unable to meet its liabilities as they become due in the ordinary course of business. *Id.*

5. *National banks. Statutory remedy for usury—limitations.*—The limita-

tion of two years within which suit may be brought against a national bank, under section 5198 of the United States Revised Statutes, for taking usurious interest, begins to run from the time when such interest is paid. *National Bank of Rahway v. Carpenter*, 52 N. J. Law, 165; S. C., 19 Atl. Rep'r, 181. Where commercial paper is transferred to, and discounted by, a bank at a greater rate of interest than six per cent, and the net proceeds, after deducting the interest charged, are credited to the transferrer, this is a payment of the interest, within the meaning of the statute. *Id.*

*Venue of action.* — An action may be brought in any county or district court in the county in which a national banking association is located, having jurisdiction of the amount involved, for a penalty, under section 5198 of the Revised Statutes of the United States. *Schuyler Nat. Bank v. Bollong*, 28 Neb. 684; S. C., 45 N. W. Rep'r, 134.

*Amount of recovery.* — In an action against a national banking association, for a penalty, under section 5198 of the Revised Statutes of the United States, the plaintiff may recover double the amount of interest actually paid, and is not confined to double the amount of usury paid. *Id.*

*Powers — taking security.* — A banking corporation organized under the laws of the United States can take an assignment of the money due and to become due from a city of the second class, on a contract for paving a street, from the contractors, to secure an existing, *bona fide* indebtedness by the contractor to the bank. *First Nat. Bank v. Ottawa*, 43 Kans. 294; S. C., 23 Pac. Rep'r, 485.

*Contracts — ultra vires — remedy.* — Though a national bank is not authorized to purchase municipal bonds and agree to return them to the seller at the purchase-price or less, yet when the amount which it paid for the bonds is tendered back to it, and their surrender demanded, its authority to retain them no longer exists; and the fact that the contract under which it obtained them may be illegal will not prevent the seller from maintaining an action for their value, as such action is not in affirmance of the contract, but in disaffirmance of it, and to prevent the bank from retaining the benefit which it has derived from its unlawful act. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67; S. C., 11 Sup. Ct. Rep'r, 496.

Since the bank was not in default until the demand for the return of the bonds, the conversion occurred when it refused compliance therewith; and the seller is entitled to recover at least the difference between the price at which he sold the bonds and their value at the time of the demand. *Id.*

6. *Taxation. Meaning of word "banker" in statutes.* — One whose business is buying and selling stocks for his customers, and who employs capital in his business, and has a regular place for transacting it, is a "banker," within the meaning of Revised Statutes of United States, sections 8407, 8408, which provide that every person "having a place of business \* \* \* where money is advanced or loaned on stocks, bonds," etc., "or where stocks, bonds," etc., "are received for discount or for sale, shall be regarded as a \* \* \* banker," and impose a tax "on the capital employed by any person in the business of banking." *Richmond v. Blake*, 132 U. S. 592; S. C., 11 Sup. Ct. Rep'r, 204.

*National banks — taxation by territory.* — Under Revised Statutes of the United States, section 5134 et seq., providing for the incorporation of national banks in both states and territories, the territories have the same power to tax national



banking associations located in them as have the states, notwithstanding that section 5219, which expressly confers the power to tax such associations, only mentions states, and provides that, in assessing taxes imposed by the authority of the "state within which the association is located," the shares in such association may be included in the valuation of the personal property of the owner of them. *Talbott v. Silver Bow County*, 139 U. S. 438; S. C., 11 Sup. Ct. Rep'r, 594.

*The words "other moneyed capital" construed.*—The provision in section 5219 above, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," is not violated by Revised Statutes of Montana, division 5, chapter 53, section 1003, providing that when the "entire capital stock of any incorporated company shall be invested in assessable property in the territory of Montana, such stock shall not be taxed," as the restriction imposed by section 5219 refers to other "moneyed capital," used in making a profit on money by the use of the moneyed capital as money, not to capital invested in mining, manufacturing or transportation. *Id.*

*Tax upon dividends — defenses.*—The tax of five per cent imposed by act of congress, June 30, 1864, section 120, upon all dividends declared to stockholders "as part of the earnings, income or gain of any bank," was assessable against the bank for the whole amount of dividends so declared, notwithstanding that it had paid a sum to the state of New York, under act of New York April 23, 1866, imposing a tax against the stockholders upon the value of their shares, and requiring the bank to retain the amount thereof from the dividends due them, until it was made to appear that their tax was paid. *Central Nat. Bank v. United States*, 137 U. S. 355; S. C., 11 Sup. Ct. Rep'r, 126.

*Statement of bank as to dividends conclusive — subsequent discovery of embezzlements.*—The act of a bank in declaring a dividend, and making a sworn return of the taxes due thereon, as required by section 120 of the act of congress, was conclusive as to the liability of the bank, and it could not avoid paying the tax by showing that, owing to an undiscovered embezzlement by its cashier, there were no "earnings, income or gain" for the year, and that the dividends were in fact ignorantly paid out of the capital and accumulated surplus of former years. *Id.*

*Privilege taxes on bonds.* A statute of Mississippi providing for a privilege tax upon banks in proportion to their capital stock or assets, the same to be in lieu of all other taxes, was upheld as constitutional and valid in *Vicksburg Bank v. Worrell*, 67 Miss. 47; S. C., 7 South. Rep'r, 219.

*Exemption of treasury notes — statutes construed.*—Under Revised Statutes of Texas, 1879, article 4634, placita 4, as amended by laws of Texas 1883, page 111, providing that private bankers shall list for taxation their money on hand and in transit, and in the hands of others subject to draft, except treasury notes, and their bills receivable and other credits, and that from this aggregate shall be deducted the amount of "money on deposit," they are entitled to deduct the full amount due depositors, though part of the money deposited may have been treasury notes, "money on deposit" being general deposits, and not special deposits held by bank as a bailee. *Griffin v. Heard*, 78 Tex. 607; S. C., 14 S. W. Rep'r, 892. Treasury notes accumulated by a bank as part of its reserve by retaining such notes when received over its counter, and paying out

other money, are exempt from taxation, though one of the purposes of selecting and retaining them may have been to escape taxation on that amount of money. *Id.* Money in the hands of others subject to draft is a credit due the bank, and is not exempt though the money originally deposited may have been treasury notes. *Id.*

7. *Miscellaneous. Cashier's bond — liability of sureties — defenses.*— The by-laws of a bank provided for the appointment of an "exchange committee," without whose sanction the cashier was to make no loans above a certain amount. The committee was to consist of the president, cashier and a designated director, of whom a majority were to have power to act. Held, that the failure to designate a director does not affect the power of the president and cashier to act as such committee. *Wallace v. Exchange Bank*, 126 Ind. 265; S. C., 26 N. E. Rep'r, 175. It being still the cashier's duty under this by-law to consult the president in making loans above the prescribed amount, the fact that there was no director designated to act as the third member of the committee does not so enlarge the powers and duties of the cashier in such matters as to discharge the sureties on his bond from liability for losses resulting from unauthorized loans. *Id.* The total failure to appoint such committee, had there been such failure, would be no defense to the sureties, in an action for the loss of money by such cashier in dealing in "options" and in "bucket shops," that being utterly unauthorized. *Id.* An agreement of the board of directors of a bank, increasing the salary of a cashier in consideration of his performing additional duties, not changing his duties as cashier, or his relation to the bank as such, does not release the sureties on a bond previously given for the faithful performance of his duties as cashier from liability for a breach of duty as such cashier. *Id.*

*Discounting note of depositor — discharge of indorser.*— A bank which has discounted a note made by one of its depositors, but payable elsewhere, does not relieve the indorser from responsibility, by not applying the maker's deposit to the payment of the note. *Sieger v. Second Nat. Bank*, 132 Penn. St. 307; S. C., 19 Atl. Rep'r, 217.

*Direction of depositor to pay certain debts — insolvency of bank — trust.*— A person directed his bank to pay certain debts, which would mature during his absence, and gave a check to cover the amount. The bank paid one creditor with a sight draft on its own correspondent, and failed before the draft was paid. A receiver was appointed, and plaintiff, holder of the draft, filed a bill to have the receiver declared a trustee of the assets for its benefit. Held, that a trust was not created by the mere revocable direction of the debtor, to which plaintiff was not a party. *Louisville Banking Co. v. Paine*, 67 Miss. 678; S. C., 7 So. Rep'r, 462.

*Cable transfers by bank — disregard of instructions — liability.*— Plaintiff purchased of defendant in New York a cable transfer of £5,000 to M. & Co. of Glasgow, and directed that a check for that amount should be sent by mail from defendant's London office to Glasgow. Defendant knew that this money belonged to plaintiff, and was sent to M. & Co. for the purpose of paying a draft he had drawn on them therefor. Defendant cabled the order to its London office, and the amount was placed to M. & Co.'s credit at the Bank of Scotland in London, pursuant to general instructions from M. & Co., and M. & Co. were notified by letter which reached them February 28, and expressed their assent. The

next day M. & Co. suspended, and the £5,000 in question was appropriated by the Bank of Scotland to the payment of overdrafts of their account, so that plaintiff derived no benefit therefrom and was afterward compelled to pay his draft. Held, that defendant being plaintiff's agent, and dealing with property known to be his, is liable for the loss resulting from its failure to follow his instructions. *Bank of British North America v. Cooper*, 11 Sup. Ct. Rep'r, 160; S. C., 187 U. S. 478. The burden is on defendant to show that if the money had been sent to Glasgow according to plaintiff's instructions it would not have been applied to the payment of his draft, and hence that no loss actually resulted from its disobedience.

*Foreign bill of exchange, what is.*—A Cincinnati bank drew a draft upon a New York bank to the order of a Chicago bank — held it was a foreign bill of exchange. *Armstrong v. Am. Exchange Nat. Bank*, 188 U. S. 493; S. C., 10 Sup. Ct. Rep'r, 450.

*Estoppel of drawer to deny consideration — notice.*—The Cincinnati bank represented to plaintiff, the Chicago bank, that one W. was a *bona fide* holder of the bill, as purchaser or remitter, for his use in trading with K., and plaintiff relying on such representation took the bill on deposit from K., knowing that he had received it from W., placed it to his credit as cash, and paid his checks, the drawing bank or its receiver is estopped, in an action on the bill, to show that W. was not a *bona fide* holder. *Id.* The fact that the bill was payable to plaintiff's order is not notice to it that W. was not the purchaser or remitter. *Id.*

A similar holding was made in the same case with reference to an instrument in the nature of a certificate of deposit which had a similar history and was used in the same manner as the above-mentioned draft.

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## CITY OF RICHMOND V. DUDLEY.

(Supreme Court of Indiana, Sept. 17, 1891.)

1. MUNICIPAL CORPORATIONS. PROHIBITORY ORDINANCE AS TO STORAGE OF OILS VESTING ARBITRARY DISCRETION IN COMMON COUNCIL. A city ordinance prohibiting the storage by any person within the city limits of inflammable oils, except upon permission from the common council, leaving it to the common council to say whether a particular place is suitable for the purpose, or a particular person is a proper one to whom to grant permission, and allowing the permission to be revoked at the will of the council, is invalid, because of the power of arbitrary discrimination it vests in the council.

**A**PPEAL from circuit court, Wayne county, D. W. Comstock, judge. Action by the city of Richmond against Charles E. Dudley for violation of a city ordinance. Judgment for defendant. Plaintiff appeals. Affirmed.

*A. C. Lindemuth* and *Fox & Robbins* for appellant. *Burchenal & Rupe* for appellee.

MILLER, J. This was an action brought before the mayor of the city of Richmond against the appellee for the violation of a city ordinance regulating the storing and keeping of petroleum and other inflammable oils within the corporate limits. Judgment was rendered against the appellee before the mayor, and the cause appealed to the Wayne circuit court. In that court demurrers were sustained to the several paragraphs of complaint and judgment on the demurrer rendered against the appellant. The only question before us is as to the validity of the ordinance. The sections of the ordinance to which the objections are made are as follows: "§ 1. Be it ordained by the common council of the city of Richmond that it shall be unlawful for any person to keep or store any petroleum, naphtha, benzine, gasoline, coal oil or any inflammable or explosive oils, within the corporate limits of the city of Richmond, in quantities greater than five barrels at a time, except as hereinafter provided. § 2. Any person desiring to keep or store any of the oils or products mentioned in the first section of this ordinance within the corporate limits of the city, in quantities greater than five barrels at a time, shall present a written petition to the common council, at a regular meeting thereof, setting forth an exact description of the location, premises and buildings on and in which it is proposed to keep and store such oils and products and the manner and kind of vessels in which the same are to be kept, the kind of oils, and the purpose for which they are to be kept. § 3. Upon the presentation of the petition, as provided in section two of this ordinance, the common council may, if the location and buildings described in said petition and the purpose and keeping of such oils and products, are deemed suitable and proper and that the person presenting such petition is a proper person, grant such permission to the person presenting such petition, to keep and store such oils and products on the premises, and in the manner set forth in the petition, or in the manner which the council may direct, in quantities greater than five barrels at a time, which permission so granted may be revoked at any time at the option of the council; and the rights and privileges to be exercised by the person receiving such per-

mission shall not be assignable or transferable by the person receiving the same to any other person, directly or indirectly, and any attempt so to do shall be deemed a revocation of all rights and privileges on the part of the person making the attempt." Two objections are urged against the validity of this ordinance: (1) That it gives to the council the power to arbitrarily discriminate between citizens by giving the permission to some and withholding it from others under similar conditions, and because "specifies no terms or conditions to be observed in the keeping or storing of such oils which could be complied with by all citizens alike. (2) That the ordinance is unreasonable and is an undue restraint upon lawful trade and business.

The subject covered by the ordinance in question is clearly within the police power conferred by the charter upon the municipality. Section 3155 of the Revised Statutes of 1881, provides that the common council of a city shall have power to make by-laws and ordinances not inconsistent with the laws of the state, and necessary to carry out the objects of the corporation. The danger to be apprehended from the storing of inflammable or explosive substances in large quantities within the limits of a city to life and property is so great as to invite legislative control of the same by the city government. The principal question in this case is whether or not the ordinance in question is a valid exercise of that power. It will be observed that this ordinance does not establish any general rule for the storage of substances proposed to be regulated; but reserves to itself, at regular meetings, the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose, and the person presenting the petition "a proper person." It further provides that the permission, when granted, "may be revoked at any time, at the option of the council." Language better calculated to enable the common council to arbitrarily control the business, without any fixed or known rules, cannot well be imagined. The business of keeping, storing and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen. In the case of *Bills v. City of Goshen*, 117 Ind. 221; 20 N. E. Rep'r, 115, an ordinance of the city requiring a license for carrying on the business of roller skat-

ing, and providing that such license should be issued upon the payment into the city treasury of such sum of money "as the mayor or common council shall determine in each particular case," was held invalid, the objection being that a discretion was lodged in the mayor or common council in fixing the fee to be charged. In the opinion this language is quoted with approval from *Horr & Bemis on Municipal Police Ordinances*: "The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses." In *Yick Wo v. Hopkins*, 118 U. S. 356; 6 Sup. Ct. Rep'r, 1064, an ordinance of the city of San Francisco, prohibiting the carrying on of laundries without a permit from the board of supervisors, except in buildings constructed of stone, was held invalid.

The court say: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, with restriction, the use for such purposes of buildings of brick or stone; but as to wooden buildings — constituting nearly all those in previous use — it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living." In *Baltimore v. Radecke*, 49 Md. 217, an ordinance of the city of Baltimore prohibiting the use of steam-whistles without the permit of the mayor was held invalid. The objection to the ordinance was that it permitted him to exercise his own discretion in revoking a permit, without general rules to guide or control his action. In *Barthet v. City of New Orleans*, 24 Fed. Rep'r, 564, an ordinance was held invalid which made it unlawful to maintain a slaughter-house "except permission be granted by the council of the city of New Orleans." In *State v. Mahner*, 9 South. Rep'r (La.), 480, an ordinance of the city of New Orleans forbidding the keeping of dairies within certain limits, except by the permission of the city council, was held to be null and void. In *City of*

*Newton v. Belger*, 143 Mass. 598; 10 N. E. Rep'r, 464, an ordinance which permitted the board of aldermen to exercise a discretion in granting or refusing a permit for the erection of buildings within a fire-district was held invalid. Ordinances, apparently aimed at the "Salvation Army," prohibiting marching through the public streets without first obtaining the consent of the mayor or common council, or some other specified officer, not containing regulations operating uniformly on all processions, have been held invalid in *Re Frazee*, 63 Mich. 396; 30 N. W. Rep'r, 72; *Anderson v. City of Wellington*, 40 Kans. 173; 19 Pac. Rep'r, 719; *City of Chicago v. Trotter* (Ill.), 26 N. E. Rep'r, 359. It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply. We are of the opinion that the ordinance under consideration is objectionable for the reasons indicated. Having arrived at a conclusion that will necessarily not only dispose of the case, but invalidate the ordinance, we deem it unnecessary to pass upon the other objection to its validity. The ordinance, in its present form, cannot be enforced; and, if another one should be enacted, we must presume that the municipal authorities will, in their wisdom, enact a proper and reasonable ordinance. Judgment affirmed.\*

**Municipal corporations — ordinances — police power.**— Analogous questions to those involved in the foregoing case are discussed in *Chicago v. Trotter*, 4 Am. R. R. & Corp. Rep. 73, and note.

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\* Reported in 26 N. E. Rep'r, 73.

## HIELSCHER V. CITY OF MINNEAPOLIS.

(Supreme Court of Minnesota, July 10, 1891.)

1. EMINENT DOMAIN. VACATING STREET. ACTION BY ABUTTING OWNER. A cause of action for the recovery of damages is not stated against a municipal corporation by the plaintiff—an abutting lot-owner—in a complaint in which the only act complained of is the passage by the city council, and the subsequent approval by the mayor, without the consent of the plaintiff, and without any compensation whatsoever to him, of a resolution or ordinance declaring a part of a public way abandoned and vacated.

**A** PPEAL from district court, Hennepin county; Smith, judge.

*Edward C. Gale* for appellant. *Robert D. Russell* and *Wm. H. Morse* for respondent.

**COLLINS, J.** Appeal from an order sustaining a general demurrer to the complaint in an action wherein the plaintiff demanded judgment for damages. In this pleading the plaintiff, after setting forth that he was the owner of a duly-described lot in the city of Minneapolis, alleged the passage by the city council on a certain day, and the subsequent approval by the mayor, of a resolution or ordinance whereby that part of Nineteenth avenue a public street, which extended from Washington avenue west one hundred and sixty-five feet to the rear end of plaintiff's lot, at which point Nineteenth avenue terminated, had been forever closed, vacated and abandoned; that these proceedings were wholly without his knowledge or consent, and without any compensation to him whatsoever. It was further alleged that, since the abandonment, that part of the avenue covered by the vacating resolution or ordinance had been filled and occupied with buildings and other obstructions, whereby the plaintiff had been deprived of his so-called "frontage" thereon, and of all access to Washington avenue, save by a circuitous route. It will be noticed that plaintiff's right to obtain a money judgment against the defendant city is based upon the action of its authorities in respect to vacating and abandoning the avenue immediately in the rear of plaintiff's premises. Although it is averred that the same has been filled and occupied with buildings and is otherwise obstructed, it is nowhere claimed or alleged that the city has placed



the buildings or other obstructions on the ground, or has had any thing whatsoever to do with their being put there. The act complained of, and for which compensation is demanded, is that performed by the council and the mayor, when the former passed and the latter approved the resolution or ordinance before mentioned. The pleading wholly fails to state the commission or performance of any other act by the city or its officers. The question which has been presented and argued by the plaintiff's counsel is as to the right of the city to vacate a public way without compensation to an abutting owner, or, to put it in another form, the power of the municipal authorities to destroy a street or avenue, by way of surrender and abandonment, without the consent of abutting owners, or without just compensation. His contention is that his client, as the owner of a lot contiguous to the avenue, had a property interest in the maintenance of the full easement therein — a property right which the law recognizes, and of which he cannot be deprived, except as before stated, and on this contention he rests his claim that a good cause of action was set forth in the complaint, and the demurrer should have been overruled. In disposing of this appeal, a determination of the question presented is not demanded. If the counsel is wrong in his position, the court below did not err. On the other hand, if the proposition laid down by him be correct, it proves too much for his success. If it was not within the power of the municipal authorities to vacate and abandon the avenue without making compensation to the plaintiff as the owner of a valuable property right by virtue of his ownership of a lot abutting on the same, the pleading itself has very clearly established the entire absence of a cause of action, because it is therein distinctly asserted that the proceedings of which he complains were without his consent, and without any compensation to him whatsoever. If the law be as plaintiff's counsel asserts, the avenue has not been vacated or abandoned, and none of his property rights, conceding that they exist to the full extent claimed by counsel, have been impaired or interfered with. Accepting the law to be as contended for, it is plain, from the allegations found in the complaint, that, by the passage of the resolution or ordinance, nothing was accomplished, and the entire proceeding was of the most harmless character. Order affirmed.\*

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\* Reported in 49 N. W. Rep'r, 237.

**Vacating street — action for damages by abutting owner.** — The owner of property abutting on a public street, no matter how established, and without regard to the ownership of the ultimate fee, has certain private rights in the street, among which is the right of access, which includes the right to use the street for the purpose of passing to and fro between his premises and some connecting thoroughfare. *Lewis Em. Dom.*, §§ 100, 114; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio & Miss. R. Co.*, 7 Ind. 479; *Rensselaer v. Leopold*, 106 Ind. 29; *Indiana, B & W. R. Co. v. Eberle*, 110 Ind. 542; *Transylvania University v. Lexington*, 3 B. Monr. 25, 27; *Chicago v. Union Building Association*, 102 Ill. 379, 397; *Crawford v. Delavan*, 7 Ohio St. 459; *Jackson v. Jackson*, 16 Ohio St. 153; *Lexington & Ohio R. Co. v. Applegate*, 8 Dana, 289; *Lackland v. North. Mo. R. Co.*, 81 Mo. 180; *Thurston v. St. Joseph*, 51 Mo. 510; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush, 882; *Anderson v. Turbeville*, 6 Colw. 150; *People v. Kerr*, 27 N. Y. 188, 215; *Kellinger v. Forty-second St. R. Co.*, 50 N. Y. 206; *Story v. New York El. R. Co.*, 90 N. Y. 122; *Lahr v. Met. El. R. Co.*, 104 N. Y. 268; *Burlington, etc., R. Co. v. Reinhackle*, 15 Neb. 279; *Denver v. Boyer*, 7 Col. 113; *McQuaid v. Portland, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 34, and note; *East End Street R. Co. v. Doyle*, 2 Am. R. R. & Corp. Rep. 747, and note; *Kincaid v. Indianapolis Natural Gas Co.*, 3 Am. R. R. & Corp. Rep. 1; *Fobes v. Rome, etc., R. Co.*, 3 Am. R. R. & Corp. Rep. 182, and note; *Abendroth v. Manhattan R. Co.*, 3 Am. R. R. & Corp. Rep. 309; *Porter v. Midland R. Co.*, 3 Am. R. R. & Corp. Rep. 357; *Duyckinck v. New York El. R. Co.*, 3 Am. R. R. & Corp. Rep. 744.

In *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 545, the court says: "What-ever may be the rule of decision elsewhere, nothing is better settled in this state than that the owners of lots abutting on a street may have a peculiar and distinct interest in the easement in the street in front of their lots. This interest includes the right to have the street kept open and free from any obstruction which prevents or materially interferes with the ordinary means of ingress to and egress from the lots. It is distinguished from the interest of the general public, in that it becomes a *right appendant*, and *legally adhering to the contiguous grounds and the improvements thereon*, as the owner may have adapted them to the street. To the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. \* \* \* The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred." In *Transylvania University v. Lexington*, 3 B. Monr. 25, 27, the court says: "Every owner of ground on any street in Lexington has a right as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets. And of this right the legislature cannot deprive him without his consent or a just compensation in money." And see *Anderson v. Turbeville*, 6 Colw. 150; *Kellinger v. Forty-second Street R. Co.*, 50 N. Y. 206.

These private rights are entirely distinct from the public right or easement subordinate to it, but not dependent on it. Consequently, the public may abandon its rights without impairing the private easement. The power to

vacate streets is as indisputable as the power to establish them, and is one of the powers usually conferred upon municipal corporations. But this power extends only to the public easement. A street cannot be closed so as to prevent access to abutting property, without the consent of the owners of such property, or compensation paid. *Transylvania University v. Lexington*, 3 B. Mon. 25, 27; *Anderson v. Turbeville*, 6 Coldw. 150, 157. In the latter case the court say: "The owners of lots bordering upon a public street have an easement of way in the street, in addition to the use of it in common with the people generally. This additional right of way is private property, within the protection of the law, as much as if it were corporeal property, and cannot be taken for public use without just compensation." See, also, *dictum* in *Heller v. Railroad Co.*, 28 Kans. 623. This right of access does not extend beyond the necessity of the case, and, therefore, is limited to so much of the street in front of each proprietor as will afford him a convenient outlet to some connecting street. "The extent of this appurtenant right, depending on circumstances, may not, in a particular case, be easily definable with mathematical precision. As far as it exists, however, it partakes of the character of private property, and is, therefore, protected by the fundamental law, as property. But it cannot, as to each proprietor of ground, be co-extensive with all the streets and alleys of the city. As a private right, it must like that of vicinage, be limited by its own nature and end; that is, chiefly, by the necessity of convenient access to, and outlet from, the ground of each proprietor." *Transylvania University v. Lexington*, 3 B. Monr. 25, 27. Consequently, when part of a street is vacated, those whose property does not abut upon the vacated portion and who have access to their property by the remaining portion of the street, cannot complain. *Pollack v. Trustees of San Francisco Orphan Asylum*, 48 Cal. 490; *Chicago v. Union Building Association*, 103 Ill. 379; *Hessing v. Scott*, 107 Ill. 600; *East St. Louis v. O'Flynn*, 119 Ill. 200; *Gray v. Iowa Land Co.*, 26 Iowa, 387; *Dempsey v. Burlington*, 66 Iowa, 687; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kans. 623, 625; *Castle v. County of Berkshire*, 11 Gray, 26; *People v. Supervisors*, 20 Mich. 95; *Petition of Concord*, 50 N. H. 530; *Commissioners of Coffey County v. Venard*, 10 Kans. 95, 100; *Kings County Fire Ins. Co. v. Stevens*, 101 N. Y. 411; *McGee's Appeal*, 114 Penn. St. 470; *Bailey v. Culver*, 12 Mo. App. 175. It has been held that the vacation and closing of one street afforded no ground of complaint when access remained by other streets, but we should doubt this proposition as universally applicable. *Fearing v. Irwin*, 55 N. Y. 486; *Coster v. Mayor*, 48 N. Y. 899; *Smith v. Boston*, 7 Cush. 254.

These conclusions in regard to the vacation and closing up of streets are a logical and necessary sequence from the rights of abutting owners as established by numerous authorities already cited. Some decisions of the supreme court of Iowa, however, are in conflict with these views. First it was decided by that court that, when part of a country road was vacated one not abutting upon the part vacated could not recover damages. *Brady v. Shinkle*, 40 Iowa, 576. This is in accordance with the general doctrine as above stated. But this decision was immediately followed by one holding that one abutting on the part vacated could not recover damages. *Ellsworth v. Chickasaw County*, 40 Iowa, 571. The latter case was held not to differ in principle from the former. Finally comes the case of *Farr v. City of Oskaloosa*, 45 Iowa, 275. Plaintiff owned two lots upon Kossuth street, in Oskaloosa. The lots and

streets were platted by one White. The fee of the street was in the public, the reversion in White. The plaintiff's lots were improved, at an expense of several thousand dollars, with dwellings occupied by tenants. The Central Railroad Company procured a quit-claim from White of Kossuth street, secured from the city council an ordinance vacating the street, and then proceeded to cut down the grade six feet and fill it with railroad tracks constructed and used in such manner as to prevent access to the plaintiff's premises and preclude all travel on the street by the plaintiff or the public. The value of plaintiff's property was almost wholly destroyed. In a suit against the city and railroad company the plaintiff set up the foregoing facts, the defendants demurred, and the demurrer was sustained. The decision was based upon *Brady v. Shinkle* and *Ellsworth v. Chickasaw County*, *supra*. It was held that, on vacation of the street, the title vested in the railroad company under its deed from White, that plaintiff ceased to have any rights in the soil of the street, and could no more complain of the building of the railroad upon it than he could if it had been built on an adjacent lot. The result in this case must certainly strike the average layman as a great outrage. It is calculated to make one lose faith in the efficacy of constitutions or the justice of the law. It shows that the rights of the individual cannot be safely trusted to the good faith or judgment of a city council. It is an argument in favor of the liberal construction of constitutional limitations in favor of individual rights. The conclusions above announced as to the rights of abutting owners are more consonant to reason, as they certainly are to every one's sense of what is just and fair.

It has been held that a city could not vacate a street for twenty years, during which it was to be put to private use. *Glasgow v. St. Louis*, 87 Mo. 678, affirming S. C., 15 Mo. App. 112. Also that a street could not be narrowed without compensation to those abutting thereon. *Rensselaer v. Leopold*, 106 Ind. 29. Where a statute provided that a city should not vacate a street "when objected to by property-owners adjacent thereto or by those having a direct or substantial interest therein," it was held that one just outside of the city limits, at whose land the street terminated, was not within the statute, and consequently could not defeat the vacation by objecting. *House v. Greensburg*, 93 Ind. 533.

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## McCLARNEY v. CHICAGO, M. & ST. P. RY. Co.

(Supreme Court of Wisconsin, Oct. 20, 1891.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYE. DERAILMENT OF CAR BY ACCUMULATIONS OF SNOW AND ICE. Where a car is derailed by reason of the accumulation of snow, ice and dirt on the flanges of the rails, the railroad company is liable to an employe on the car, who sustained injuries by reason of the derailment, since the duty of keeping its track in proper repair rests on the master.

2. EVIDENCE AND INSTRUCTION. In an action for such injuries, testimony that, at the place where the car left the rail, considerable snow and dirt came

up to and between the flanges on the inside of the rails, is sufficient to warrant the jury in finding that the track was not cleared, or the rails properly flanged, and that these defects caused the car to leave the rail.

3. The fact that the company permitted piles of snow to accumulate on the outside of the tracks, close to the rails where the accident happened, does not render the company liable for the injury, in the absence of evidence showing that such accumulations contributed in any way to the derailment of the car.

**A** PPEAL from circuit court, Eau Claire county, Egbert B. Bundy, judge. Action by Jefferson McClarney against the Chicago, Milwaukee and St. Paul Railway Company for injuries sustained by plaintiff while in defendant's employ. From a judgment in plaintiff's favor defendant appeals. Reversed.

*John T. Fish, Burton Hanson and M. Griffin* for appellant.  
*J. H. Mullen, V. W. James, and Davis, Kellogg & Severance* for respondent.

COLE, C. J. The plaintiff bases his right to recover damages for the injury which he sustained on the negligence of the defendant company to keep its track in a safe and proper condition. The particular negligence alleged in the complaint was its failure to keep the flanges of the rail properly cleared from ice, snow, dirt and rubbish and in allowing the spaces between the tracks to become filled with snow, ice and dirt, so that the track was dangerous to those operating its road. The plaintiff was yard-master of the station where he was injured and his duties consisted in making up trains, handling cars and placing them where they were wanted. On the morning of the 9th of March, 1888, while engaged in moving cars in the yard, an empty box-car, on the top of which he was riding, was derailed and he was thrown from it, and very seriously injured. What caused this derailment of the car is the real point in controversy. The contention of the plaintiff was, and is, that it was caused by the neglect and failure of the defendant to keep the track at the place of derailment properly flanged out, or the flanges of the rail clear from ice, snow, dirt and other material, and that, as a consequence, the forward trucks of the car on which he was standing ran off the track. On the other side it is insisted that the evidence fails to show that this was the cause of the accident, and that, at the place where the truck left the rail, there was any accumulation of ice, snow or

rubbish, which made the track unsafe; in other words, that no actionable negligence is shown. It would seem hardly necessary to state that it was the duty of the defendant to keep its track free from obstructions which rendered the moving of cars upon it dangerous to its employes, and that the company is under obligation to see that this duty is performed by some one. Of course, it would follow that it was bound to keep its track properly flanged and free from dangerous obstructions, such as ice, snow and rubbish, which endangered the safety of those operating its road. This is the duty and obligation of the company, as this court has frequently stated, and the rule is founded in reason and authority. At all events, that is the established doctrine of this court. We deem it only necessary to refer to the cases of *Dorsey v. Construction Co.*, 42 Wis. 583; *Bessex v. Railway Co.*, 45 Wis. 478; *Hulehan v. Railway Co.*, 68 Wis. 520; 32 N. W. Rep'r, 529 — where the law is fully discussed. In whatever aspect the question has arisen, it has been uniformly held by this court that the duty of the master to the servant, or his implied contract with the servant, required that the servant should be under no risk from imperfect or inadequate machinery or from unskillful or incompetent fellow-servants of any grade. This is a duty or implied contract which the master must perform by himself or by some other and until it is performed his duty from the implied contract is not kept or fulfilled.

In the case at bar it is insisted that there was no testimony given which would warrant an inference or finding that the track where the car was derailed was unsafe in consequence of accumulations of ice, snow, dirt or other material on it, and that such track had not been properly flanged out. We do not so understand the testimony. Several of the witnesses testified, in effect, that they examined the track soon after the accident, and found at the place where the car left the rail that snow and dirt came up to and between the flanges, and that there was considerable in between the flanges between the track. It was ice and dirt, hard snow and chaff. There was considerable of it all through there to the place where the plaintiff fell. It came pretty close to the top of the rail. The wheel left the track at that point. The testimony of Schwirtz). Hugley testified to the same condition of things, as did Murdock and Balow. So that there was abundant

evidence in the case from which the jury might have found that the track was not cleared or properly flanged, and that this may have caused the car to leave the rail. True, there was a sharp conflict of testimony on the point, but it cannot fairly be claimed that the negligence charged was wholly unsupported by the proof given on the trial.

There were other tracks in the yard, and for some time prior to the accident the snow which fell from time to time was shoveled or thrown between these tracks. This condition of things had continued nearly all winter, and snow between the tracks was piled up to the depth of two or three feet. The snow was quite close to the rails on the outside, and tapered up, angling. It likewise appeared that, about the 1st of March there was quite a fall of sleet and snow, which, it was claimed on the part of the defendant, had been removed from between the rails, and that on the night of the 8th of March there was a further fall of an inch and a half or two inches of damp snow. This last fall had not been cleared off on the morning of the 9th of March, when the plaintiff commenced work moving cars in the yard. The learned circuit court held, and, as we think, properly, that, if the accident was caused by the new-fallen snow of the previous night, no negligence could be imputed to the company for not having removed it, because it had not had sufficient time to do so before the accident. But the court further added: "But if old snow and ice had negligently been allowed to accumulate and become packed together, as claimed by the plaintiff, so that such a slight fall of snow as fell that night, and which is common in this country, and the jury find that but for such previous accumulation it would not have been dangerous, but, falling upon such old accumulations, the two together caused the accident both contributing thereto, the defendant should be held liable for the result of the accident thus caused, because but for such negligence it would not have happened." This charge was excepted to by the defendant, but, in my judgment, it stated the law correctly. This, however, is my individual opinion, for which my associates are not responsible; but it seems to me, in this latitude, that the company is bound to anticipate snow-falls in the month of March, and it should so prepare and arrange its track that such a light fall as two inches would not render its track dangerous. It is bound to provide for

and guard against such contingencies which are so likely to happen.

While it is alleged that the company was negligent in allowing the spaces between the tracks to become filled with snow and rubbish, yet it does not appear that such negligence caused or contributed in any way to the injury. A party must, of course, trace his injury to the negligent act, or, in other words, the negligence must be the proximate and direct cause of such injury. Now, had the plaintiff been injured while passing from one track to another through the snow in order to perform an act in the line of his duty, there would be ground for saying that the negligence of the company in placing or leaving the snow where it did, caused the injury. But that was not the case. It is obvious the car was derailed by something on or near the rail on which it was moving. It does not appear that the snow that was piled between the tracks in the yard contributed in any way to the accident. The defendant asked several instructions, only two of which were given by the court. The refusal to give such instructions was excepted to. We think the fourth instruction was applicable to the evidence in some phases of it, and should have been given. It is as follows: "The court instructs you that you cannot find the defendant liable in this case by reason of the piles of snow which were between the tracks of the yard in which the plaintiff was employed at the time of the accident." The correctness of this instruction is obvious from the remarks which we have already made, and the refusal to give it was error. Some other points were discussed on the argument relating to the admission of evidence and that the verdict was excessive. We shall express no opinion upon these points, but reverse the judgment, and send the case back for a new trial, because of the refusal of the court to give the instruction just referred to. The judgment is reversed, and a new trial ordered.\*

1. **Railroad companies — accidents to employees — engine derailed by obstruction on track caused by a stranger.** — The proof disclosing that plaintiff, while acting in the capacity of fireman on a railroad locomotive, was injured by a fall occasioned by the derailling of the engine, tender, etc., and that the accident was caused by the car-wheels coming in contact with a loose plank resting on one of the rails of railroad track, held, that the plaintiff, in order to recover of the master, must show that the accident was caused by the direct and immediate act of its servants; and in case the proof shows that the acci-

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\* Reported in 49 N. W. Rep'r, 963.



dent would not, in all likelihood, have happened, but for the interposition of some independent responsible third party between the servant's negligence and the injury sustained, and it affects the result, and is the immediate cause of the injury, the plaintiff cannot recover against the original wrong-doer. *Mire v. East Louisiana R. Co.*, 42 La. Ann. 385; 7 So. Rep'r, 473.

2. **Derailling by reason of defective switch—brakes out of order.**—Where plaintiff was injured by the derailling of his locomotive at a switch which was defective, in that the spring was not strong enough to throw the point of the switch against the rail, and keep it there, when the position of the lever indicated that this was the position of the switch, and that it was safe to pass it, an instruction that the injury was due to the negligence of fellow-servants, in not placing the rails in a proper position by the unusual means of a maul or axe, is properly refused. *Texas, etc., R. Co. v. Johnson*, 76 Tex. 431; 13 S. W. Rep'r, 463. It is proper to refuse to charge that plaintiff could not recover on account of any defect in the brakes of the car derailed, where there is evidence that, had such brakes been in good order, the train might have been stopped before plaintiff was injured notwithstanding the defective switch. *Id.*

3. **Unloading cars with a "plow" while on a curve—failure to provide suitable appliances.**—A railroad employe was injured by the breaking of a cable used to draw a "plow" over flat cars loaded with gravel. The cars were at the time standing on a curve, and in that position the strain on the cable was greater than when the cars were on a straight track, and required additional appliances than those in use at the time in order to render its use entirely safe. There was no evidence that the cable was insufficient to operate on a straight track. Held, that the evidence justified a verdict that the accident was caused by the company's negligence in not providing suitable machinery. *Cincinnati, etc., R. Co. v. Roesch*, 126 Ind. 445; 26 N. E. Rep'r, 171.

### CORLIN V. WEST-END STREET RAILWAY CO.

(Supreme Judicial Court of Massachusetts, June 29, 1891.)

1. **STREET RAILROADS. GETTING ON ELECTRIC-CAR WHILE IN MOTION. CONTRIBUTORY NEGLIGENCE.** Plaintiff was injured while attempting to get on board a street-car propelled by electricity, which he had signaled to stop. He attempted to enter before it came to a full stop; it started suddenly, throwing him down. Held, that the question of his contributory negligence was for the jury.

**EXCEPTIONS** from superior court, Suffolk county, Charles P. Thompson, judge. An action was brought by K. A. Corlin against the West-End Street Railway Company to recover for personal injuries sustained while attempting to board a car. At the conclusion of the testimony for plaintiff, defendant asked the court to rule upon the evidence that the plaintiff was not en-

titled to recover. The court so ruled, and the jury returned a verdict for the defendant. Plaintiff brings exceptions.

*Champlin, Ryther & Wentworth* for plaintiff. *M. F. Dickinson, Jr.*, and *S. Williston* for defendant.

KNOWLTON, J. It was admitted by the defendant at the argument that there was evidence on which the jury might have found that the defendant was negligent. The only ground on which it was contended that the ruling of the court should be sustained was the alleged absence of evidence that the plaintiff was in the exercise of due care. The defendant conceded that the mere fact that the plaintiff was getting on a street-car propelled by electricity while it was in motion did not show negligence on his part, but argued that the court should take judicial notice that street-cars propelled by electricity often run at a rate of speed which makes it dangerous for passengers to attempt to get upon them, and that the plaintiff failed to show that this car was not so running. It has often been held that the fact that a horse-car is in motion does not necessarily make it negligent as a matter of law for a passenger to attempt to get upon it, although we can imagine cases in which, on account of the rate of speed or for other reasons, it would be negligence in law for a person of ordinary strength and agility to do so. *Briggs v. Railway Co.*, 148 Mass. 72; 19 N. E. Rep'r, 19; *McDonough v. Railroad Co.*, 137 Mass. 210; *Meesel v. Railroad Co.*, 8 Allen, 234; *Murphy v. Railway Co.*, 118 Mass. 228. There is nothing in the bill of exceptions to show that any different rule should be applied than if the car had been a horse-car, moving at the same rate of speed. It is to be inferred that the car was designed for the transportation of passengers from place to place along the public streets, and to take them up and leave them as requested. No platforms or other conveniences for getting on or off were constructed at particular points on the route, and, if there was a rule requiring the car to be stopped to receive and discharge passengers only at designated places, the bill of exceptions does not show it. On the question whether the plaintiff was using due care, such a rule would be immaterial, unless he knew it or ought to have known it. It is probable that the car could be as easily controlled as a horse-car, and we see no reason for applying to it a rule of law which is not applicable to

horse-cars. The plaintiff described in a general way his own conduct, the conduct of the driver, and the motion of the car just before and at the time of the accident. He did not give in express terms his estimate of the rate of speed at which the car was going. If a jury could properly have found from his testimony that he was acting as men of ordinary prudence are accustomed to act in getting on the car under the circumstances, the ruling of the court was erroneous. It has been held that the absence of evidence of the particulars of a plaintiff's conduct is not fatal to his recovery where negligence of the defendant is shown, and where it appears in general that the plaintiff was in the line of his duty in a place where no particular act of precaution was required, and where it does not appear that he was guilty of any act of negligence. In such a case it may be inferred that he was ordinarily careful. *Maguire v. Railroad Co.*, 146 Mass. 379; 15 N. E. Rep'r, 904. In the present case the plaintiff testified that when the car approached him he signaled to the driver to stop by raising his hand, and that the driver looked straight at him, and made a motion with the motor crank; that it seemed to him that the car slackened its speed, and as it was slackening up he put his right hand on the railing to get on, but the car shot forward as he took hold of the railing, and he fell to the ground. Being asked whether the car had stopped when he put out his hand to get on, he answered, "Not to a dead stop." There was some evidence tending to show that the speed of the car was diminished just before the plaintiff attempted to get on, and was then suddenly increased; and we cannot say as a matter of law that the plaintiff was negligent. We think it was a question for the jury, on all the evidence, whether he was using such care as ordinary persons are accustomed to use under like circumstances. There is much to indicate that the car was going too fast to give the plaintiff an opportunity to get upon it safely, and that he ought not to have tried to get on; but, in the opinion of a majority of the court, the question presented by his account of the circumstances is one of fact rather than of law and it should have been submitted to the jury. Exceptions sustained.\*

1. *Boarding moving street-car. Plaintiff thrown off by sudden jerking of car.*—In action for personal injuries, the evidence for plaintiff showed that,

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\* Reported in 27 N. E. Rep'r, 1000.

as a street-car approached, he signaled twice, being in full view of the conductor and person driving, and that after the second signal the horses commenced to slacken their speed, and came to a walk, as they approached the crossing where he stood; that he seized the rail and placed one foot upon the step, and was raising the other, when the conductor called, "Don't stop there," and the horses were given a slap with the lines, which caused a sudden jerk, throwing plaintiff to the ground. Held, that the case was properly submitted to the jury, both as to negligence of defendant and contributory negligence of plaintiff. *Butler v. Glens Falls, etc., Street R. Co.*, 131 N. Y. 112; 24 N. E. Rep'r, 187.

*Plaintiff incumbered with luggage.*—One who, having his left arm incumbered with his coat and dinner-bucket, attempts to board a street-car while still in motion, and falls off by reason of the slipping of his foot from the step on which he has placed it, and of his inability to hold onto the car with his right hand alone, is guilty of contributory negligence. *Reddington v. Philadelphia Traction Co.*, 182 Penn. St. 154; 19 Atl. Rep'r, 28.

2. *Starting car suddenly while plaintiff is in the act of alighting.*—It is the duty of the driver of a horse-car, when signaled to stop, to ascertain who and how many of his passengers intend to alight at that place, to wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts the car in motion, and if he fall in any of these respects, and injury results, his employer is liable. *Birmingham Union Ry. Co. v. Smith*, 90 Ala. 60; 8 So. Rep'r, 86. To the same effect, *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247; 7 So. Rep'r, 360; *Augusta, etc., R. Co. v. Randall*, 85 Ga. 297; 11 S. E. Rep'r, 706.

In a case where it was a disputed question, whether the car had stopped upon the proper side of the street and whether plaintiff was not guilty of contributory negligence in attempting to alight before the car had reached the proper stopping place, it was held that if the conductor of the street-car was not in his place on the car, and the train stopped anywhere on the street in apparent response to the pulling of the bell-cord by plaintiff, and she, believing reasonably that the stop was made for the purpose of allowing her to alight, was injured in attempting to do so, the question of contributory negligence was one of fact for the jury. *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247; 7 So. Rep'r, 360.

3. *Knowledge of ordinance as to place of stopping street-cars when presumed.*—The residents of a municipality must be held to know the rule as to the place of stopping of trains of street-cars prescribed by an ordinance of the city. *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247; 7 So. Rep'r, 360.

4. *Boarding moving railroad train.*—In an action against a railroad company for personal injuries, the evidence showed that plaintiff, a man of sixty-five, on a dark and cold night, after waiting in the snow and becoming benumbed, attempted to board a moving train; that, with a valise in one hand, he seized the railing with the other, and attempted to leap upon the platform, but missed his footing and was dragged one hundred and fifty yards, during which time he held on to the valise. Held, that plaintiff was guilty of such

contributory negligence that he could not recover, though the train did not stop a reasonable time, so as to allow plaintiff to get on. *McMurtray v. Louisville, etc., R. Co.*, 67 Miss. 601; 7 So. Rep'r, 401. See, also *Browne v. Raleigh, etc., R. Co.*, 108 N. C. 84; 13 S. E. Rep'r, 958.

5. Effect of acting under directions of conductor.— Where a party having the care of stock in a freight-car, requiring his attention, attempted to enter the car with the sanction of the conductor, and under his assurance that it would be safe, and that he would have ample time to do so before the train moved, and was injured by the sudden and unexpected movement of the train while in the act of entering the car, held, that the company was liable. *Olson v. St. Paul, etc., R. Co.*, 45 Minn. 536; 48 N. W. Rep'r, 445. The conductor of a railway train has control of its movements, and represents the corporation, and persons boarding a car with his consent have a right to rely upon his assurance that it is safe to undertake so to do before the train moves. *Id.*

Where the conductor of a freight train has ordered a passenger to go to a coach attached to a freight train and get in it, and then signals the engineer to start the train, without waiting to see whether the passenger had gotten on, the company is not liable for injuries received by him in trying to get on the car in motion, where the train had already been stopped a reasonable time, and the passenger had willfully delayed to get on it. *Browne v. Raleigh, etc., R. Co.*, 108 N. C. 84; 13 S. E. Rep'r, 958.

A passenger who is injured while attempting, by direction of the conductor, to board a moving train while in such proximity to a raised platform as to render the consequences of a misstep possibly serious, is guilty of contributory negligence, even though the train is not moving faster than one or two miles an hour. *Ruger, C. J.*, and *O'Brien and Andrews, JJ.*, dissenting. *Hunter v. Cooperstown, etc., R. Co.*, 126 N. Y. 18; 26 N. E. Rep'r, 958. See, also, *Herman v. Chicago, etc., R. Co.*, 79 Iowa, 161; 44 N. W. Rep'r, 298.

6. Alighting from moving railroad train.— Alighting from a moving railroad train is, in general, such contributory negligence as will bar a recovery for injuries received in making the attempt. *Whelan v. Georgia, etc., R. Co.*, 84 Ga. 506; 10 S. E. Rep'r, 1091; *McLaren v. Atlanta, etc., R. Co.*, 85 Ga. 604; 11 S. E. Rep'r, 840; *Dewald v. Kansas City, etc., R. Co.*, 44 Kana. 586; 24 Pac. Rep'r, 1101; *Porter v. Chicago, etc., R. Co.*, 80 Mich. 156; 44 N. W. Rep'r, 1054; *Kilpatrick v. Pennsylvania R. Co.*, 140 Penn. St. 503; 21 Atl. Rep'r, 408.

7. Starting train while plaintiff in act of alighting — negligence.— A female passenger having been injured by the train starting while she was getting off, the company is not entitled to a charge that its contract was performed on the arrival of the train, if the station was announced, and the train stopped a sufficient time to give her an opportunity to alight, and that its servants were not bound to assist her in alighting. *St. Louis, etc., R. Co. v. Finley*, 79 Tex. 85; 15 S. W. Rep'r, 266. While the duty of the carrier to all passengers is the same in degree, the amount of care may vary with the age, sex or bodily infirmity of the passenger, and the carrier is not entitled to a charge that it owes no greater duty to a female passenger than to a male one. *Id.*

8. Same — starting of train due to accidental pulling of bell-rope by passenger.— At the trial of an action against an elevated railroad company for injuries sustained by a passenger while stepping from the car to the station

platform, owing to the sudden starting of the train, a witness testified that, to steady himself when the train stopped, he caught hold of the bell-cord, and thereby gave the signal which caused the train to start. The court charged that if the jury found that the train was so started then defendant was not negligent and plaintiff could not recover. Held, that defendant could not have been prejudiced by the refusal of the court to charge that there was no proof that there was any vice in the system of communicating signals or that the method of fixing the bell-rope was not the best method and that the jury were not to consider these questions. *Ferry v. Manhattan Ry. Co.*, 118 N. Y. 497; 23 N. E. Rep'r, 822.

9. *Running train past station — backing train while passenger in act of alighting.*—The running of a railway passenger train beyond the usual stopping place at the station, and then pausing a sufficient length of time to reverse the motion so as to back it to the proper stopping place, is not of itself negligence; but whether the pause was so long that it indicated an invitation to the passengers to alight, and whether the backward movement was made without warning while they were alighting, are questions of fact for the jury. *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374; 46 N. W. Rep'r, 773.

## CHASE'S PATENT ELEVATOR CO. v. BOSTON TOW-BOAT CO.

(Supreme Judicial Court of Massachusetts, Oct. 23, 1890.)

1. CORPORATIONS. COMMENCING BUSINESS BEFORE CAPITAL PAID IN AND CERTIFICATE FILED. VALIDITY OF CONTRACT. Public Statutes of Massachusetts, chapter 106, section 46, providing that no corporation "shall commence the transaction of the business for which it was organized" until the whole of its capital stock has been paid in, and a certificate of such payment filed in the office of the secretary of state, and sections 61, 62, providing that the stockholders shall be jointly and severally liable for debts or contracts prior to that time, and that their liability shall be conditional upon the recovery of a judgment against the corporation, do not render a contract void which has been entered into by the corporation before the capital has been paid and certificate filed as required, but the effect of the statutes is simply that the personal liability of the members of the corporation takes the place of what has not been paid in on the stock as security for the performance of the contract.

**A** PPEAL from superior court, Bristol county. Action by Chase's Patent Elevator Company against the Boston Tow-boat Company upon a written agreement by which plaintiff was to furnish to defendant an elevator for delivering coal. A demurrer to the replication was sustained and judgment ordered for defendant. Plaintiff appeals. Reversed.

*J. F. Jackson* for plaintiff. *W. S. Rogers* for defendant.

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HOLMES, J. This is an action for the price of an elevator furnished to the defendant by the plaintiff, under a written agreement. The answer alleges that at the time of its making and performing the agreement the plaintiff's capital stock had not been paid in, and a certificate of the payment, etc., had not been filed, as required by Public Statutes, chapter 106, section 46, which forbids a corporation to "commence the transaction of the business for which it was organized" until those things are done. The replication alleges that before the contract and sale a certificate of organization had been issued, and a large part of the stock paid in; that shortly afterward the stock was paid in in full; and that a certificate was filed before the date of the writ. There is a demurrer to the replication, on which the superior court ordered judgment for the defendant.

A majority of the court are of the opinion that the demurrer must be overruled on the ground that the facts alleged in the answer are no defense. In other words, we are of opinion that section 46 of chapter 166 of the Public Statutes, just referred to, when construed with the rest of the chapter, and in the light of former decisions, cannot be taken to make the contract void.

By section 61 of the same chapter the "stockholders in any corporation which is subject to this chapter shall be jointly and severally liable for its debts or contracts in the following cases: \* \* \* First, for such as may be contracted before the original capital is fully paid in," etc. By section 62 their liability is made conditional upon the recovery of a judgment against the corporation. It is expressly contemplated, therefore, that a corporation may make contracts before complying with section 46, upon which a judgment may be recovered. It cannot be maintained that the contracts for which the corporation, and, secondarily, the stockholders, are thus liable are confined to contracts outside of its business, and so not within the scope of section 46. Such a limitation would be in the face of the obvious purpose to protect the public, which is shown by the first clause of section 61. Some of the contracts mentioned — for instance, those in the fourth clause (debts to operatives) — are plainly contracts made in the course of business, yet they fall under the words "debts or contracts," at the beginning of the section, so that those words would have to be read as meaning two different things at once, as applied to the

different clauses, in order to make the supposed limitation possible. The words are substantially the same that were used when corporations could begin business before the whole amount of their stock had been paid in. Gen. Stat., chap. 60, § 17. At that time, of course, they extended to contracts in pursuance of the business for which the corporation was organized as was assumed by the cases. *Merrick v. Governor Co.*, 101 Mass. 381; *Hawes v. Petroleum Co.*, 101 Mass. 385, and 111 Mass. 200; *Gearing Co. v. Whittier*, 117 Mass. 451. There is no reason for construing them differently now, and it has not been suggested that they have not the same extent as before in the cases which have arisen since Statutes 1870, chapter 224, now embodied in Public Statutes, chapter 106. *Barre Nat. Bank v. Hingham Manufg Co.*, 127 Mass. 563. See *Kelley v. Railroad*, 141 Mass. 496; 6 N. E. Rep'r, 745. It follows that if the parties to this action were reversed, and the defendant was the one who relied on the contract, section 46 would not prevent a recovery.

If, then, the contract sued upon bound the plaintiff, it would be entirely anomalous to hold that the defendant was free. The general rule is that, when a contract is made void by a prohibition, it is void against both sides. *Oranson v. Goes*, 107 Mass. 439, 440. The defense of *ultra vires*, in the sense that the contract was illegal or prohibited, has been set up by corporations so much oftener than against them that it is hard to find cases of the latter sort; whereas, if either party were to be precluded from it, it would be the corporation. It may be worth noticing, however, that the decisions assume that, if it is a defense to the corporation, it is a defense to the other party. *Railway Co. v. Redmond*, 10 C. B. (N. S.) 675; *Manufacturing Co. v. Clark*, 32 Mo. 305, 308; *Railroad v. Proctor*, 29 Vt. 93, 96; *Bank v. Sherwood*, 10 Wis. 230. The same principle was recognized in the cases concerning prohibited insurance, relied on by the defendant. *Williams v. Cheney*, 3 Gray, 215, 222; *Jones v. Smith*, 3 Gray, 500, 501; *Insurance Co. v. Lapsley*, 15 Gray, 262, 263; *Insurance Co. v. Hastings*, 2 Allen, 398, 400; *Insurance Co. v. Pursell*, 10 Allen, 231, 232.

If a corporation makes such a contract as this before its capital stock is fully paid in, the result of sections 46 and 61 is not that it is void as against both contractors, nor that it binds the cor-



poration, and is void as against the other party, but simply that the personal liability of the members of the corporation takes the place of what has not been paid in upon the stock as security to the other party.

By General Statutes, chapter 61, section 8, the officers of the corporations there mentioned were required to publish certificates similar to that now required, but of less scope, "before such corporation commences business." This plainly means that such corporation shall not commence business until the certificate is published. But it was decided that that section did not prevent the corporation from recovering upon a contract made before the certificate was published. The discussion was directed mainly to showing that the corporation existed before the filing of the certificate; but one ruling asked was a general one that the plaintiff could not recover, and it is said that "in the opinion of the court this omission of the officers cannot be set up to defeat the plaintiff's right to recover." *Merrick v. Governor Co.*, 101 Mass. 381, 384. A similar decision was made with regard to a similar statute of Connecticut. *Gearing Co. v. Whittier*, 117 Mass. 451.

The act of 1870 was passed just after the decision in *Merrick v. Governor Co.* It was very plain from the language of that case, which we have quoted, that this court did not regard General Statutes, chapter 61, section 8, as invalidating contracts made before the certificate was published. If the legislature had intended to change the law in that respect it would have been likely to mark its intention by some greater change than that from "before such corporation commences business, the president \* \* \* shall," to "no corporation \* \* \* shall commence the transaction of the business \* \* \* until." Stat. 1870, chap. 224, § 32; Pub. Stat., chap. 106, § 46.

It is suggested that, although the public are protected by the liability of the stockholders until the stock is paid in, they are not protected afterward in case of a failure to file the certificate. But if the stock is paid in, in fact, the public have all the security to which they are entitled. The certificate does not protect them; it protects the stockholders, if any one. Pub. Stat., chap. 106, § 59; *Barre Nat. Bank v. Hingham Manufg Co.*, 127 Mass. 563, 569, 570; *Stedman v. Eveleth*, 6 Metc. (Mass.) 114.

Perhaps it was partly in recognition of this fact that the former liability of members until the certificate was filed, even if the stock had been paid in (Gen. Stat., chap. 60, § 17; chap. 61, § 5), was dropped in Statutes 1870, chapter 224, section 39, and Public Statutes, chapter 106, section 61.

The prohibition against commencing business is somewhat more vague than the specific prohibition of certain contracts of insurance by foreign companies in Public Statutes, chapter 119, section 197; and it is noticeable that even in the latter case, where the prohibition was carried to its logic conclusion, and was held to make the prohibited contracts void, the legislature corrected it. Stat. 1851, chap. 331, § 6; Stat. 1852, chap. 311, § 8; Stat. 1854, chap. 453, § 36; Stat. 1856, chap. 252, § 49; Gen. Stat., chap. 58, § 72; Pub. Stat., chap. 119, § 200. See, also, *Libbey v. Downey*, 5 Allen, 299; Stat. 1863, chap. 171.

Taking all that we have said into account, we do not think that the legislature intended, or that the words of the statute mean, that, if a corporation makes a contract in contemplation of beginning business as soon as it has filed a certificate, the contract shall be void, even if making the contract is itself in a sense beginning business. See *Manufacturing Co. v. Ferguson*, 113 U. S. 727; 5 Sup. Ct. Rep'r, 739. The fact that the contract is performed before the statute is satisfied does not alter the case. The validity of the contract is determined at the time when it is made. See, further, *Bowditch v. Insurance Co.*, 141 Mass. 292; 4 N. E. Rep'r, 798.

Demurrer overruled.\*

#### CONTRACTS OF CORPORATIONS—RECENT DECISIONS.

1. *Mortgage executed without authority of board of trustees.*—Where the charter of a corporation provides that its property shall be purchased, held, managed and sold by a board of five trustees, a mortgage executed by the president and secretary, without any action of the board authorizing or ratifying, was held invalid and not binding on the corporation. *Nucleus Association v. McElroy*, 131 Penn. St. 398; 18 Atl. Rep'r, 1063.

2. *Assent of board or stockholders individually given, not sufficient—ratification.*—Where a mortgage was executed by the president, secretary and two stockholders of a corporation and no corporate seal was attached, and the only evidence of authority to execute was that the secretary obtained the consent of a majority of the stockholders, by going around to them privately, it

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\* Reported in 28 N. E. Rep'r, 300.

was held error to admit it in evidence as against the corporation ; also that the use of the money derived from the mortgage would not of itself amount to a ratification. *Duke v. Markham*, 105 N. C. 131 ; 10 S. E. Rep'r, 1017.

3. *Authority of president to give a judgment note.*—Where a corporation has contracted to give its judgment note, it thereby authorizes the president to execute such note on its behalf. *McDonald v. Chisholm*, 131 Ill. 273 ; 8 N. E. Rep'r, 596.

4. *Note executed by treasurer—presumption of authority.*—Where there is nothing to show that a corporation does not possess the usual power of a trading corporation to make notes, or that the treasurer had not the usual authority of treasurers of such corporations, it will be presumed that a note executed in the name of the corporation by the treasurer was duly authorized. *Coreoran v. Snow Cattle Co.*, 151 Mass. 74 ; 23 N. E. Rep'r, 737.

5. *Contract for benefit of future corporation—adoption by corporation.*—Where a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. *Abbott v. Hapgood*, 150 Mass. 248 ; 22 N. E. Rep'r, 907.

6. *Parol evidence to show contract executed in name of officer to be contract of corporation.*—Parol evidence is not admissible to charge a corporation on a negotiable note, signed by its president in his own name, with nothing on the face of the note to indicate the capacity in which he signed. *Sparks v. Despatch Transfer Co.*, 104 Mo. 581 ; 15 S. W. Rep'r, 417. In an action on a bill of exchange drawn on a corporation by an individual, and by him accepted for the corporation, it is competent for plaintiff to prove by parol evidence that such individual was the officer and agent of the corporation, and had authority to, and did, as such, accept the bill of exchange, though he did not sign his name officially or as agent. *Rumbough v. Southern Imp. Co.*, 106 N. C. 461 ; 11 S. E. Rep'r, 528. See, also, *Taylor v. Albemarle Steam Nav. Co.*, 105 N. C. 484 ; 10 S. E. Rep'r, 897.

### BALLOU V. EARLE ET AL.

(Supreme Court of Rhode Island, July 25, 1891.)

1. *EXPRESS COMPANIES. LIMITING LIABILITY FOR LOSS TO A SPECIFIED AMOUNT.* The giving by an express company, and the acceptance by a shipper, of a printed receipt valuing a package received for transportation at \$50, and limiting the liability of the company for loss to that amount, unless the value was otherwise therein expressed, is, in the absence of an expression of greater value, a valid agreement as to the extent of the company's liability where the package was lost through the negligence of the company.

**A**SSUMPSIT by William L. Ballou against William H. Earle and Henry Prew, co-partners as the Earle and Prew Express Company, for the value of a package lost by the defendants.

*Stephen A. Cook, Jr., and Louis L. Angell* for plaintiff. *Arnold Green* for defendants.

TILLINGHAST, J. This is *assumpsit* to recover the sum of \$579, being the value of a box of diamonds which the plaintiff delivered to the servant and agent of the defendants to be by them transported by express to New Bedford, in the state of Massachusetts. Jury trial is waived, and the case is to be tried to the court on the law and the facts. The defendants, who are common carriers of merchandise for hire, received from the plaintiff at Providence, on the 26th day of July, 1890, a package containing diamonds of the value aforesaid, to be by them delivered to C. W. Haskins, at New Bedford, Mass. The plaintiff had, and for a considerable time previous to the above-named date had had, in his possession and constant use a book of the defendants' contract receipt blanks, at the top of each page of which was printed what purports to be a mutual agreement between the shipper and the common carrier, which agreement, in so far as it is material for our present consideration; provides that the defendants "are not to be held liable or responsible for any loss or damage to said property \* \* \* unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company, or their servants; nor in any event shall the holder hereof demand beyond the sum of \$50, at which the article forwarded is hereby valued, unless otherwise herein expressed or unless especially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of Earle and Prew's Express." One of these blanks the plaintiff filled out for the addressed package in question, but gave no value thereof, although there was a blank column in said receipt marked "value." This receipt was signed by the defendants' agent when the plaintiff gave the package to the agent. The defendants had no knowledge of the contents or value of said package except as stated in said receipt at the time of its delivery to them, nor did they make any inquiry of the plaintiff concerning the same. This package was lost by the negligence of the defendants' servant before it reached their office, and said defendants admit their liability therefor under said agreement, and offer to pay the said sum of \$50, which, they contend, is the limit of their liability. The plaintiff testifies that his reason

for not giving any value to the package was because the expressage was to be paid by the consignee. The defendants, on the other hand, testify that the reasons given them by the plaintiff for not giving any value to the package in said receipt were that it cost more money, and that the consignee had previously complained of the charges of expressage in cases where the values had been given, and that he adopted this mode to lessen said charges.

We think it is very evident that the purpose of the plaintiff in not giving any value to the package was to save, either to himself or to the consignee, and it matters not which, the additional expressage which would have been charged by the defendants if the real value had been given; for it must be presumed from the terms of the receipt that, as the defendants assume a liability only to the extent of the valuation therein named, the rate of expressage is graduated by said valuation. Under this state of facts the plaintiff's final contention, which logically should be the first, and hence we will consider it first, is that the express assent of the owner of the goods to the restrictions of the carrier's liability must be found to give effect to it in any case. We think the decided preponderance of the authorities is to the contrary; and that the well-settled rule now is that in the absence of fraud, concealment or improper practice the legal presumption is that stipulations limiting the common-law liability of common carriers contained in a receipt given by them for freight were known and assented to by the party receiving it. *Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Steamship Co.*, 57 N. Y. 1; *Harris v. Railway Co.*, 1 Q. B. Div. 515; *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90; *Quimby v. Railroad Co.*, 150 Mass. 365; 23 N. E. Rep'r, 205; *Burke v. Railway Co.*, 5 C. P. Div. 1; *Maghee v. Railroad Co.*, 45 N. Y. 514; *Grace v. Adams*, 100 Mass. 505; *Insurance Co. v. Buffum*, 115 Mass. 343; *Hill v. Railroad Co.*, 73 N. Y. 351. For a full discussion of the contrary doctrine, see *Hollister v. Nowlen*, 19 Wend. 234, and cases cited. In the case at bar a printed *fac simile* of the receipt in question is before us, which shows that the terms and conditions upon which the defendants received the goods in question must have been well known to the plaintiff. And more especially is this to be taken for granted from the fact that a book of the defendants, filled with receipt blanks identical with this, was in the plaintiff's pos-

session, and in almost daily use by him. From an examination of said *fac simile* it is evident that there was not only no attempt to conceal the terms and conditions of the bailment on the part of the defendants, but, on the other hand, that it had been their purpose to make the same specially prominent and noticeable. It is all printed on one side of the paper, and at the top thereof. It is headed by the caution, printed in bold type, "Read the Conditions of this Receipt," and all the printed matter precedes the signature of the agent of the defendants. We think, therefore, that the receipt in question ought to be regarded as having received the assent of the plaintiff, and as being, as its language purports, the mutual agreement of the parties touching the package in question.

Having found, then, that there was an agreement between the parties as to the limit of the defendants' liability in case of loss, we come to the main question in the case, viz., was said agreement valid and binding upon the parties thereto? or, to state the question more broadly, to what extent is a common carrier entitled to contract in limitation of his common-law liability? This is a question in so far as it applies to carriers by land, upon which there has been great contrariety of opinion in different courts, the earlier cases holding that it was against public policy, and hence impossible, for common carriers to guard themselves by any stipulations whatever against liability from loss arising from any other cause than the act of God or the public enemy. This question is discussed in Edwards on Bailments (section 552, and cases cited in note 5), while the later cases have materially modified this rule in the carrier's favor, and permitted him not only to contract so as to change the extent of his liability as fixed by the common law, but such contracts, when made with his employer, became almost entirely the measure of his responsibility. "And this custom," says Hutchinson on Carriers (section 119), "has become so universal in transactions with carriers that his liability may now be said to depend almost exclusively upon contract. He still stands, however, in the relation of common carrier to the goods intrusted to him, notwithstanding his contract, however much it may lessen his common-law liability, and he cannot, even by the most express contract, divest himself of that character, and change it to that of a mere private carrier or ordinary bailee." Davidson

v. Graham, 2 Ohio St. 181, 140; Railroad Co. v. Lockwood, 17 Wall. 357; Hooper v. Wells, 27 Cal. 11; Christenson v. Express Co., 15 Minn. 270 (Gil. 208); Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 180; Kirby v. Express Co., 2 Mo. App. 369; but see Express Co. v. Sands, 55 Penn. St. 140; Grogan v. Express Co., 114 Penn. St. 523; 7 Atl. Rep'r, 134. Without attempting a review of the conflicting authorities upon the question before us, which would answer no useful purpose here, we will only say that upon an examination thereof we have come to the conclusion that the decided weight of the authorities, as well as the better reason, favors the rule that a common carrier may, to a great extent at least, contract in limitation of his common-law liability, "provided," as stated in Express Co. v. Caldwell, 21 Wall. 264, "the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." The shipper and the common carrier are thus authorized to enter into an express agreement, within certain limits, as to the terms upon which the latter will transport and convey for the former a certain article of personal property of an agreed value to a designated place for an agreed price. We fail to see that the recognition of the validity of such an agreement is violative of any sound rule of public policy. Indeed, it seems to us that public policy requires the upholding of such an agreement as tending to the honest disclosure of value on the part of the shipper, and the exercise of that degree of diligence on the part of the carrier which is commensurate with the value of the particular article conveyed, and the price paid for such conveyance. To illustrate: A. has a box of tinware of the value of \$5, which he wishes to send to Boston by B., a common carrier. The box is delivered to B. under an agreement similar to the one before us, no information being given as to the contents of said box. What is the degree of care which B. is expected to exercise in the transportation of this box? Manifestly that degree of care which is commensurate with a box whose value does not exceed that stipulated in the contract, to-wit, \$50. B.'s maximum liability in case of loss being known to him beforehand, he will naturally exercise such a degree of care as would ordinarily insure the safe delivery at its destination of an article of this value. Moreover, he is only paid for assuming a risk to the extent of \$50, and he has graduated his charge for

carriage accordingly. Such an agreement certainly strikes one as eminently fair and reasonable. Neither party is deceived or misled thereby. The shipper on the one hand is insured of the safe delivery of his goods at their destination, or their value in money, in case of loss, and the carrier, on the other hand, proportions his care to the liability which he has assumed. Both parties thus act understandingly and intelligently. There is little opportunity for fraud on the part of the shipper, and none for overcharge on the part of the carrier. To illustrate again: A. wishes to send a box of diamonds, valued at \$500, to Boston, Mass., and employs B., a common carrier, to transport the same thence under an express agreement which stipulates, among other things, that the value thereof is \$50, the charge for expressage being based upon that valuation. As in the former case, B. assumes, and has the right to assume, that the value of this package does not exceed the sum of \$50, and he, therefore, proportions his care accordingly. The package is lost by B., whereupon A. seeks to hold him liable for the actual value of said package, which was many times larger than that agreed upon. B. was only paid for the care and transportation of a package of the value of \$50, and the degree of care which he used was sufficient for a transaction of that sort, while it was quite insufficient for a transaction of the sort which he was induced by misrepresentation on the part of A. to undertake. Had he been apprised of the actual value of this package, he would have exercised that degree of care which was commensurate therewith, and would also have graduated his charge accordingly. To allow A. to repudiate his contract with B. in case of loss, and hold the latter to his strict common-law liability, under the circumstances, is little less than to permit him to perpetrate a fraud under the guise of enforcing a legal right.

If this illustration fairly represents the case at bar, and it seems to us that it does, it shows the unreasonableness and injustice of the rule of liability contended for by the plaintiff. But the main contention of the plaintiff is that an express company cannot limit its liability for loss of goods occasioned by its own negligence, and in support thereof he cites the following cases, viz.: *Grogan v. Express Co.*, 114 Penn. St. 523; 7 Atl. Rep'r, 134; *Brown v. Express Co.*, 15 W. Va. 812; *Maslin v. Railroad Co.*,



14 W. Va. 180, 191; *Newborn v. Just*, 2 Car. & P. 76; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Snider v. Express Co.*, 63 Mo. 376, 383; *Express Co. v. Graham*, 26 Ohio St. 595, 598; *Railroad Co. v. Hale*, 6 Mich. 243; *Transportation Co. v. Newhall*, 24 Ill. 466; *Graham v. Davis*, 4 Ohio St. 362; *Muser v. Express Co.*, 1 Fed. Rep'r, 382; *Express Co. v. Seide (Miss.)*, 7 South. Rep'r, 547. These cases undoubtedly sustain the position of the plaintiff in this respect; and we are not only not disposed to question their authority upon this point, but to agree entirely therewith. We do not think that it is competent for a common carrier to stipulate for exemption from loss occasioned by his own negligence or that of his servants. Such an exemption is not just and reasonable in the eye of the law. Nor is it necessary for us to so hold in order to sustain the contract under consideration; for, as stated by Blatchford, J., in *Hart v. Railroad Co.*, 112 U. S. 331, 340; 5 Sup. Ct. Rep'r, 151, "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carriers the measure of care due to the value agreed on. The carrier is bound to respond in that value for any negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." The case from which we have thus quoted was one in which the loss happened from the negligence of the defendant. The court had previously declared in the same case (page 338) that "it is the law of this court that a common carrier may by special contract limit his common-law liability; but he cannot stipulate for exemption from the consequences of his own negligence, or that of his servants,"

thus expressly affirming the doctrine previously laid down by that learned court in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *York Manuf'g Co. v. Illinois Central R. Co.*, 3 Wall. 107; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Express Co. v. Caldwell*, 21 Wall. 264; *Railroad Co. v. Pratt*, 22 Wall. 123; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 U. S. 655. But although the loss did occur from the negligence of the defendant, the court upheld the agreement as to the value of the property on the ground, as forcibly stated in the opinion, that there is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. "The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract." The rule laid down in *Grogan v. Express Co.*, 114 Penn. St. 523; 7 Atl. Rep'r, 134, a case much relied on by the plaintiff, that "an express company cannot by special contract or special acceptance limit its liability for loss of goods, resulting from the negligence of the company or its servants," is not in conflict with the case just quoted from upon this point, and, with all due respect to the learned court which rendered this decision we think that it misapprehended the decision in *Hart v. Railroad Co.*, *supra*, in declaring that that case had decided that a common carrier could limit its liability even as against its own negligence. The real distinction between these two cases, as it seems to us, is not in the rule adopted by each, but in the application thereof. In the *Grogan Case* the court holds that an agreement as to value in case of loss by negligence is not binding on the parties, on the ground, as we understand the decision, that to hold the contrary would be to uphold the carrier in stipulating against his own negligence, although it holds at the same time

that an agreement as to value "would be a protection against liability beyond that amount except for negligence." In this respect the court followed the case of *Express Co. v. Sands*, 55 Penn. St. 140, and *Farnham v. Railroad Co.*, id. 53; that is to say, these cases hold that an agreement as to value in case of loss is valid and binding, excepting only where the loss is occasioned by the negligence of the common carrier or his servant; while in the *Hart Case*, before referred to, the court holds that the agreement as to value is also valid and binding where the loss is occasioned by the negligence of the common carrier, and that so to hold "has no tendency to exempt from liability for negligence." The reasoning in the last-named case is cogent and convincing, and we are disposed to adopt the same in preference to the authorities which hold to the contrary. See, also, *Oppenheimer v. Express Co.*, 69 Ill. 62; *Kallman v. Express Co.*, 3 Kans. 205; *Brehme v. Express Co.*, 25 Md. 328; *Snider v. Express Co.*, 63 Mo. 376; *Levy v. Express Co.*, 4 S. C. 234; *Boorman v. Express Co.*, 21 Wis. 154. We, therefore, decide that it was competent for the parties to agree as to the value of the package in question in case of loss by negligence, and that, having thus agreed, they are bound thereby. Judgment must, therefore, be entered for the plaintiff for the sum of \$50.\*

**Common carriers — limiting liability to a specified amount.**—The following cases support the proposition established by the foregoing decision, that a carrier may limit his liability in amount by stipulations similar to the one therein passed upon. *Richmond & D. R. Co. v. Payne*, 1 Am. R. R. & Corp. Rep. 475; *Duntley v. Boston & Maine R. Co.*, 3 Am. R. R. & Corp. Rep. 259, and cases cited in note; *Pacific Exp. Co. v. Foley*, 4 Am. R. R. & Corp. Rep. 365, and note,

A contrary view is held in the following: *Louisville & N. R. Co. v. Wynn*, 3 Am. R. R. & Corp. Rep. 18, and cases cited in note; Cases cited in note, 4 Am. R. R. & Corp. Rep., p. 483.

On the right to limit liability generally, in addition to the foregoing cases, see: *Quimby v. Boston & Maine R. Co.*, 1 Am. R. R. & Corp. Rep. 113, and note; *Hazel v. Chicago, etc., R. Co.*, 4 Am. R. R. & Corp. Rep. 429.

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\* Reported in 22 Atl. Rep'r, 1112.

## PICKETT V. PACIFIC MUT. LIFE INS. CO.

(Supreme Court of Pennsylvania, Oct. 5, 1881.)

1. ACCIDENT INSURANCE. WHETHER DEATH BY ASPHYXIATION WITHIN POLICY. Deceased descended into the dug-out portion of a driven well to repair a pump, and in a few minutes he died from *asphyxia*, due to some deadly gas therein. This dug-out portion was but ten or twelve feet deep, and deceased had no reason to suspect the presence of noxious gas therein. Held, that his death was due to external, violent and accidental injuries, within the meaning of an accident policy insuring against that class of injuries.

2. DEATH DUE TO "THE INHALATION OF GAS." POLICY CONSTRUED. His death from such cause is not due to "the inhalation of gas," within the meaning of the terms of the policy, excepting death so caused from its indemnity, for such exception has reference only to a voluntary inhalation of gas.

3. PRACTICE. EVIDENCE. Where an insurer has not attached to a policy copies of the application or of its by-laws, as required by Act Pennsylvania, May 11, 1881 (P. L. 20), it is not entitled to introduce them in evidence in an action on such policy.

**A**PPPEAL from court of common pleas, Warren county. This was an action by H. W. Pickett, as administrator of John W. Moore, deceased, against the Pacific Mutual Life Insurance Company of California, on an accident policy issued to plaintiff's intestate, insuring him against "such violent and accidental injuries as shall externally be visible upon his person," and death resulting therefrom. There was judgment for plaintiff, and defendant appeals. Judgment affirmed.

*D. I. Ball* and *C. C. Thompson* for appellant. *Noyes & Hinckley* and *Brown, Stone & Rice* for appellee.

STERRETT, J. The undisputed facts, upon which the jury in this case was instructed to find for the plaintiff the full amount of his claim, are briefly as follows: On June 4, 1889, the plaintiff's intestate, John W. Moore, received and paid for the policy of insurance on which this suit was brought, a copy of which will be found in the record. Returning to his boarding-house, same evening, he informed his landlady that he had no dinner, and requested that his supper be prepared. He then went to the well in the open yard for a drink, and finding that the pump required priming with water, he remarked that he would fix it, so as to obviate that difficulty in the future. After procuring a

hatchet, and removing planks from the opening at the top, he descended into the dug-out portion of the well, which was four or five feet wide and only ten or twelve feet deep, for the purpose of closing a small opening in the iron pipe, about mid-way down. A few minutes later his lifeless remains were found at the bottom of the well. He died from *asphyxia*, or suffocation, due to the accidental and unconscious inhalation of carbonic acid or other deadly gas that had unexpectedly accumulated in the dug-out portion of the shallow well. The well, with which deceased was familiar, and in which he had been shortly before, was one of those known as a "driven well," made by driving an iron pipe into the ground to the depth, in this case, of about forty feet. For the distance of about ten or twelve feet from the top the earth around the iron pipe was dug out so as to form, as above stated, an open well, of about four or five feet in diameter, in which there was little or no water. The top of the well was covered with plank. The deceased was a strong, healthy man. His sudden and wholly unexpected death, under the circumstances above stated, and within a few hours after he had procured the policy of insurance, undoubtedly resulted from external, violent and accidental injuries or means, and without any conscious or voluntary act on his part. There was no evidence, nor was it even suggested, that he had committed suicide, or that he was wanting in reasonable care, or that he voluntarily exposed himself to danger. In describing the condition in which he found the body of deceased the physician who made the *post-mortem* examination testified: "The surface of the body was of a livid bluish color. The lips and tongue were blue. The right side of the head was partially distended with dark blood. the left side was nearly empty. The lungs contained more blood than they would under different circumstances. They were somewhat congested. The pulmonary arteries were distended with blood. The liver was slightly congested, and also the kidneys. There was, however, no disease of the kidneys; no disease of any of the internal organs. \* \* \* His death was caused by *asphyxia*, due to the inhalation of gas." If the latter undisputed and undoubtedly correct conclusion of fact needed any confirmation, it may be found in the testimony as to the effect of the same noxious gas on those who went to the relief of the deceased, and

assisted in removing his remains from the well. It shows how narrowly they escaped a similar violent and accidental death. The notice and proofs of death were full and complete. Their sufficiency was not even questioned.

In view of the undisputed facts, of which the above is an outline, the learned president of the common pleas refused to affirm defendant's points for charge, some of which are predicated of the foregoing facts, and instructed the jury that upon the undisputed facts before them the plaintiff was entitled to recover; and there was accordingly a verdict and judgment in his favor. This action of the court in refusing defendant's points and instructing the jury in plaintiff's favor are the subjects of complaint in the several specifications of error. The first and main point was as follows: "The clause in the policy of insurance sued on, to-wit: 'This insurance shall not cover \* \* \* death or injury resulting from or attributable partially or wholly to \* \* \* inhalation of gas' — applies to the case of death resulting from *asphyxia* caused by inhaling gas accumulated at the bottom of the well.'" This, in connection with the remaining seven points, was rightly refused. According to the undisputed facts above referred to, the death of the insured was caused by external, violent and accidental means, and without any conscious or voluntary act on his part. No one knowing, as he did, the shallowness of the dug-out portion of the well, would ever suspect the presence of noxious gas therein. Doubtless he never for a moment contemplated the slightest danger. His death was purely accidental; quite as much so as if he had been suddenly and unexpectedly engulfed in water, and drowned. The deadly but invisible gas by which he was unconsciously and accidentally enveloped was undoubtedly the external and violent cause of his injury and death. According to the physician's testimony above quoted, its violent effect upon the vital organs of the deceased was plainly visible at the time of the *post-mortem* examination. As was well said in *Paul v. Insurance Co.*, 112 N. Y. 472; 20 N. E. Rep'r, 347 (which in principle rules this case): "As to the point raised by appellant, that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death.

That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." In that case the policy on which suit was brought provided that the insurance should not extend to death caused "by inhaling gas." It appeared that the insured was found dead in bed. Gas had escaped in the room, and death was caused by breathing the atmosphere of the room filled with gas. It was held that death was not caused by the inhaling of gas, within the meaning of the policy. The company relied upon the same narrow and technical defense that is made by the defendant in this case. In an able opinion reported in 45 Hun, 313, the learned judge of the general term, whose judgment was afterward affirmed by the court of appeals, said, *inter alia*: "Was the death of the intestate caused by or through 'external, violent and accidental means,' within the language of the policy? \* \* \* We should say that death was due to external and violent means as clearly as drowning. \* \* \* The cause of death came from outside as surely as would a rifle ball or water in the case of drowning. The escape of gas into the room was violent in the same sense that would be the flow of water into a wrecked vessel. In either case, the external means constitute the cause which produces death. It is a violent death, produced by an external power, not natural. Some poisons, such as opium and chloral, produce no violent action on the human system. The man who descends into a well of carbonic acid gas is killed with no greater violence, perhaps, than was the intestate. Yet in all these cases the result would be called a violent death. \* \* \* We also think the words 'inhaling of gas' were used to designate those common uses of gas in dentistry, surgery, etc. \* \* \* Evidently an exception from death caused by a surgical operation was not broad enough to include the use of anæsthetics preparatory to the operation. It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act." On this question, the court of appeals, in affirming the decision of the general term, said: "A careful consideration of this instrument, and of the scope and design of its provisions, leads us to the conclusion that appellant must fail in its contention. \* \* \* In expressing its intention not to be liable for death from 'inhaling of gas' the company can only be understood to mean a voluntary and intelligent act of the insured, and not an involuntary and un-

conscious act. Read in that sense and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which *ex vi termini* would be included the dentist's work, or a suicidal purpose. Of course, the deceased must have, in a certain sense inhaled gas; but, in view of the finding that death was caused by accidental means, the proper meaning of the words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act, necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. \* \* \* To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but whatever the motive of the insured, his act precedes either fact. \* \* \* If the policy had said that it was not to extend to any death caused wholly or in part by gas, it would have expressed precisely what the appellant now says is meant by the present phrase, and there could have been no room for doubt or mistake. Policies of insurance are to be liberally construed, and as in all contracts, conditions are to be construed strictly against those for whose benefit they are reserved." The principles, so well stated and enforced in the cases above cited, were afterward approvingly considered in *Bacon v. Association*, 123 N. Y. 304; 25 N. E. Rep'r, 399. In further support of same principles, reference might be made to other authorities among which are: *May on Insurance*, 631, in which reference is made to *Trew v. Assurance Co.*, 5 Hurl. & N. 211; *Winspear v. Insurance Co.*, 29 Moak Eng. R. 488; *Insurance Co. v. Crandal*, 120 U. S. 532; 7 Sup. Ct. Rep'r, 685; *Mallory v. Insurance Co.*, 47 N. Y. 52; *Insurance Co. v. Burroughs*, 69 Penn. St. 43; *McGlinchy v. Casualty Co. (Me.)*, 14 Atl. Rep'r, 13; *Eggenberger v. Association*, 41 Fed. Rep'r, 172; *Association v. Newman (Va.)*, 3 S. E. Rep'r, 805 — but further elaboration is unnecessary.

This case is not ruled by *Pollock v. Association*, 102 Penn. St. 230, on which defendant relies. While that case may well stand upon its own peculiar facts, we think the present case is clearly distinguishable in its controlling facts as well as in the principles applicable to them. In that case the injury did not result from external, violent and accidental means. The fatal drug was volun-



tarily and intentionally taken by the deceased. In deciding that case this court never could have intended to lay down the broad rule that in construing an accident policy there is no distinction between external, violent and accidental causes of death, and those cases in which death results from voluntary acts. What was decided in that case was, that under the various clauses of the policy sued on, there could be no recovery, and it was unimportant whether the means arose from the designing act of the insured or otherwise.

Another ground of defense suggested in defendant's fifth, sixth and seventh points was that the deceased was injured in an occupation or exposure classed by the company as more hazardous than that specified in the policy, etc. The points referred to appear to be predicated of testimony which was improperly before the jury. The company, in disregard of the provisions of the act of May 11, 1881 (P. L. 20), had failed to attach to the policy copies of the by-laws or application, and should not have been permitted, against plaintiff's objection, to give them in evidence. The act was passed in the interest of honesty and fair dealing, and its provisions should be strictly enforced. We have no doubt they apply to such companies as the defendant.

Without further referring to the specifications of error, it is sufficient to say that neither of them is sustained. The deceased was accidentally, violently and fatally asphyxiated by the unknown presence of a fluid foreign to his person. If that fluid had been oil, smoke, water or molten metal, the result would have been substantially the same. Death, caused not so much by the inhalation of the fluid as by its action in excluding life-supporting air, would have inevitably resulted. A fair construction of the policy leads to the conclusion reached by the court below, that death resulting from causes such as killed the intestate is not within any of the exemptions relied on by the company.\*

Judgment affirmed.

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\* Reported in 32 Atl. Rep'r, 871.

**1. Accident insurance — death through external, violent and accidental means.**—Where the insured died from the effects of a blow struck by a person after an attempt to blackmail, such death is the result of accidental means within the general terms of a policy providing against injuries or death caused through “external, violent and accidental means.” *Richards v. Travelers’ Ins. Co.*, 89 Cal. 170 ; 26 Pac. Rep’r, 762.

Where a person, injured in an accident resulting in hernia, dies after a dangerous and unsuccessful surgical operation resulting in peritonitis, performed when death seemed inevitable without it, the accident is the proximate cause of his death. *Travelers’ Ins. Co. v. Murray*, 16 Col. 296 ; 26 Pac. Rep’r, 774.

An accident insurance policy, insuring against death “from bodily injuries effected through external, violent and accidental means,” but excepting death from hernia, does not relieve the insurer from liability where death results from hernia caused by “external, violent and accidental means.” *Id.*

Where death resulted from malignant pustule caused by contact with diseased or putrid animal matter, it was held not to be within the words above quoted, but to be a death from disease. *Bacon v. United States Mutual Accident Assn.*, 3 Am. R. R. & Corp. Rep. 852.

**2. Death resulting from a blow inflicted — whether death from design within policy.**—Where, in an action on an accident policy providing that the insurance shall not extend to any cause of death unless the claimant shall establish by positive proof that the death was not the result of design, either on the part of the insured or of any other person, it appearing that the insured died from the effects of a blow struck by another person, it is not error to charge that if the death of insured was caused by a blow dealt him, that would not prevent recovery if the person inflicting the blow did not mean to kill the insured. *Richards v. Travelers’ Ins. Co.*, 89 Cal. 170 ; 26 Pac. Rep’r, 762.

**3. Exceptions in policy — death caused by fighting.**—Where two parties engage willingly in a personal rencounter, it is a mutual combat or fight, and death resulting therefrom is not included in a policy of accident insurance which excepts from the risk death or injury which may have been caused by fighting. It makes no difference, in such case, whether the slayer was sane or insane. *Gresham v. Equitable Life & Acc. Ins. Co.*, 87 Ga. 497 ; 18 S. E. Rep’r, 752.

## WAIT ET AL. V. NASHUA ARMORY ASSOCIATION.

(Supreme Court of New Hampshire, July 31, 1891.)

**1. CORPORATIONS. AUTHORITY OF PRESIDENT TO CONTRACT.** Where plaintiffs, in an action against a corporation for services rendered, introduce evidence that they were employed by defendant’s president, who assumed to act in its behalf, the admission in evidence of defendant’s by-laws to show that the president had no such authority will not work a reversal, as the jury must have been so instructed as matter of law had the evidence been excluded.

**E**XCEPTIONS from Hillsborough county, before Justice Clark. *Assumpsit* to recover for services of the plaintiffs as architects in preparing plans and specifications for a proposed armory. At the trial before a jury it appeared that the defendant corporation was organized for the purpose of building and maintaining an armory in Nashua for the use of a portion of the state militia. The plaintiffs introduced evidence that they were employed by Copp, the president of the corporation, assuming to act in its behalf. The defendants offered in evidence the by-laws of the corporation for the purpose of showing that under the by-laws the president had no power to make contracts in behalf of the corporation without the sanction of the directors, and the same were admitted against the objection of the plaintiffs. It did not appear that the plaintiffs had any knowledge of the by-laws of the corporation. To the admission of the aforesaid evidence against their objection the plaintiffs excepted. Judgment for defendant. Plaintiffs except. Exceptions overruled.

*C. W. Hoitt* and *Z. S. Arnold* for plaintiffs. *Geo. B. French* for defendant.

BLODGETT, J. The plaintiffs have no ground of complaint, for, even if the by-laws were improperly admitted for the purpose of showing that the president had no power to make contracts in its behalf without the sanction of the directors, it does not show sufficient cause for setting aside the verdict. The evidence for the plaintiffs simply tended to show that they were employed by the president to prepare plans and specifications for the proposed armory, and that he assumed to act for the corporation, but there was no evidence that the corporation in any way authorized him to procure such plans and specifications, nor was there any evidence of such authority on his part from any source unless it could be implied from his office. But no such authority is incident to the office. The directors, and not the president, have the powers of the corporation, and exercise an original, rather than a delegated, authority; and the president has no implied authority, as such, to act as the agent of the corporation, but like other agents, he must derive his power from the board of directors, or from the corporation. Gen. Laws, chap. 148, § 3; *Morrill v.*

Railroad Co., 58 N. H. 68; *Boot & Shoe Co. v. Dunamore*, 60 N. H. 85, 86; *Goodspeed v. Bank*, 22 Conn. 530-558; *Mahone v. Railroad Co.*, 111 Mass. 75; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325; *Titus v. Railroad Co.*, 37 N. J. Law, 98, 102; *Burrill v. Bank*, 2 Metc. (Mass.) 163; *Turnpike Road Co. v. Looney*, 1 Metc. (Ky.) 550; *Pierce R. R.* 32-34; 2 *Mor. Priv. Corp.*, § 537; *Cook Stocks*, § 716. The by-law put in evidence was, therefore, but the statement of the general rule of law which obtains in such cases, and, if wrongly admitted, it is not susceptible of perception how the verdict could have been improperly influenced or the plaintiffs in any manner prejudiced by putting in evidence precisely what the jury must have been instructed as matter of law if the evidence had been excluded. Exceptions overruled.\*

Clark, J., did not sit. The others concurred.

#### CORPORATIONS. POWERS OF THE PRESIDENT.

1. *Power to institute and defend suits and employ counsel.* — It is generally held that the president of a business corporation has authority, by virtue of his office, in the name of the corporation, to defend suits brought against it, to institute such suits as may become necessary in the ordinary course of its business, and to employ counsel for that purpose. *American Ins. Co. v. Oakley*, 9 Paige, 495; *Savings Bank of Cincinnati v. Benton*, 2 Metc. (Ky.) 240; *Reno Water Co. v. Leete*, 17 Nev. 208; *Southgate v. Atlantic & Pac. R. Co.*, 61 Mo. 89; *Colman v. West Virginia Oil, etc., Co.*, 25 W. Va. 148; *Mumford v. Hawkins*, 5 Den. 355; *Wetherbee v. Fitch*, 117 Ill. 67; *Recamier Mfg. Co. v. Seymour*, 5 N. Y. Supp. 648; *Morse Banking*, § 144. In *Reno Water Co. v. Leete*, 17 Nev. 208, where it was held that the president had authority to commence a suit for an injunction to protect the rights of the corporation, it is said: "Prompt action is frequently indispensable, and the delay consequent upon the calling together of a board of directors and the passing of a formal resolution of authorization might produce damaging results."

The authority of the president of a manufacturing corporation to commence an action in its name is flatly denied in *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. 507, and this decision is approved in *Globe Works v. Wright*, 106 Mass. 207, 216, and *Mahone v. Manchester & L. R. Co.* 111 Mass. 72. According to the reasoning of the court in *Colman v. West Virginia Oil, etc., Co.*, 25 W. Va. 148, the power would be confined to corporations, which have a large amount of business of such a character that they must be often required to institute and defend suits. The power would seem to be limited to business corporations and to suits arising in the ordinary course of business. *Bright v. Metairie Cemetery Assn.*, 33 La. Ann. 56. In this case it was held that the president of

\* Reported in 23 Atl. Rep'r, 77.

a cemetery association had no power to employ an attorney to defend against a special assessment levied upon the property of the association.

In many, if not in most cases, the power may be implied from a course of business acquiesced in by the directors, or from other powers expressly conferred upon the president. *Merrill v. Consumers' Coal Co.*, 114 N. Y. 216. Thus, in *Wetherbee v. Fitch*, 117 Ill. 67, where it was held that the president had authority to employ counsel, the by-laws of the corporation conferred upon him the general supervision of its business and the control of all its property.

Upon the whole, it seems to us that the president's power, *virtute officii*, is limited to the case of business corporations, and then to the defense of suits brought against the corporation and to the institution of such suits of an ordinary character as may be expected to arise from the nature of the business done by the corporation. In all other cases the power must be expressly conferred by the board of directors, or implied from other powers granted, or from the course of business, or some emergency must exist which will not admit of the delay necessary to convene the board. In the latter case the president would have no power to involve the corporation beyond what the emergency required, that is, by taking such action as he should deem necessary until the board could act.

In *Recamier Mfg. Co. v. Seymour*, 5 N. Y. Supp. 648, it is held that the president may authorize a suit, even in opposition to the board of trustees, where it appears that the board are acting in the matter in furtherance of a conspiracy to defraud the corporation.

2. Power to sell, mortgage or otherwise dispose of the tangible property of the corporation not kept for the purpose of sale.—It may be laid down as a general rule that the president of a corporation has no power, by virtue of his office to sell, mortgage, pledge, convey or otherwise dispose of the property of the corporation, unless such property is held merely for the purpose of sale. In citing the cases to this proposition, we give the particular point decided in each. The president and cashier of a bank have no power to sell its safe. *Asher v. Sutton*, 31 Kans. 286; or to mortgage its property. *Leggett v. New Jersey Banking Co.*, 1 N. J. Eq. 541. The president of a bank cannot make a valid deed of its land in trust for creditors. *McKeag v. Collins*, 87 Mo. 164. The president and secretary of a seminary have no power to make a deed of its lands, unless authorized by the board of trustees to do so. *Mott v. Danville Seminary*, 129 Ill. 403. But a deed or contract executed on behalf of a corporation by its president and secretary and having the corporate seal affixed, will be *presumed* to have been executed upon due authority. *Phillips v. Coffee*, 17 Ill. 154; *Morse v. Beale*, 68 Iowa, 463; *Goodnow v. Oakley*, 68 Iowa, 25; *Jourdan v. Long Island R. Co.*, 115 N. Y. 380. The president of a corporation, although he owns all but two shares of its stock and is also its treasurer and general manager, has no power to mortgage all its property to secure a past due debt of the corporation. *England v. Dearborn*, 141 Mass. 590. The president cannot draw checks for money of the corporation on deposit. *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige, 127, 134. The president of a railroad corporation, although appointed its business and financial agent, has no power to mortgage a locomotive to secure a debt of the company. *Luse v. Isthmus Transit R. Co.*, 6 Oreg. 125. Nor can the president of such a company transfer ties in

payment of a corporate debt. *Walworth County Bank v. Farmers' Loan & T. Co.*, 14 Wis. 325.

Of course the president of a corporation has no power to use its property or funds for his individual benefit, and any person dealing with him in such a matter has notice of his want of power. *Dowd v. Stephenson*, 2 Am. R. R. & Corp. Rep. 805, and note. See, also, *San Francisco Water Co. v. Pattee*, 3 Am. R. R. & Corp. Rep. 558, and note.

3. **Power over its negotiable paper and choses in action.**—Choses in action being but a species of property, the same general principles would apply as in the matters considered in the last action. In *Hoyt v. Thompson*, 5 N. Y. 320, an assignment of a chose in action, made by the president and cashier of the corporation to secure a precedent debt, was held to be void. The following cases all hold that the president of a corporation has no power to sell or transfer promissory notes belonging to the corporation, either in payment of its debts or otherwise: *First National Bank v. Lucas*, 21 Neb. 290; *Marine Bank v. Clements*, 3 Bosw. 600; *Fifth National Bank v. Navassa Phosphate Co.*, 6 N. Y. Supp. 1; *National Bank of the Republic v. Navassa Phosphate Co.*, 8 N. Y. Supp. 929; *Mitchell v. Deeds*, 49 Ill. 415.

Some courts hold that an assignment of a note or chose in action by the president of a corporation is *prima facie* valid. *Goodrich v. Reynolds*, 31 Ill. 490; *Mitchell v. Deeds*, 49 Ill. 416; *Bambrick v. Campbell*, 37 Mo. App. 460; *Glover v. Wells (Ill.)*, 29 N. E. Rep'r, 680.

In *Titus v. Cairo & Fulton R. Co.*, 37 N. J. Law, 98, it is held that the president of a railroad company cannot give a valid power of attorney to one to sell its bonds. The court says: "In the absence of any thing in the act of incorporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their boards of directors, from whom authority to dispose of their assets must be derived. The act of the president or other officer, unless it is shown to pertain to his official duty, or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it."

4. **Power to borrow money and issue negotiable paper.**—The president has no power by virtue merely of his official position to bind the corporation by notes, drafts, acceptances or the like. *McCullough v. Moss*, 5 Den. 567; *Dabney v. Stevens*, 40 How. Pr. 341; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Col. 565; S. C., 2 Col. 248; 1 Col. 531. The president of an insurance company has no implied power to bind the company by an accommodation indorsement. *Ætna National Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167. An exception exists in the case of banks, as to paper made in the ordinary course of business of the bank. *Neiffer v. Bank of Knoxville*, 1 Head, 162. Where the president was also superintendent and general agent of the company, it was held that he had power to give new notes to take up old notes of the company. *Seeley v. San Jose Independent M. & L. Co.*, 59 Cal. 22.

Where the president of a corporation has been permitted to borrow money for the company and to execute and indorse notes and drafts for the purpose

of raising money, it will be bound by his acts in that behalf. *Fitzgerald, etc., Co. v. Fitzgerald*, 137 U. S. 98; 11 Sup. Ct. Rep'r, 36; *National Park Bank v. German Am. Mut. W. & S. Co.*, 53 N. Y. Super. Ct. 367; *Kraft v. Freeman Printing & Pub. Assn.*, 87 N. Y. 628. Where the president was given "full power and control of all the business of the company," it was held that he could give the note of the company for materials purchased. *Castle v. Belfast Foundry Co.*, 72 Me. 167. See, also, *McLaren v. First National Bank*, 76 Wis. 259. Authority "to buy and sell the articles in which the corporation deals" was held to authorize a purchase upon credit and the giving of a note for the purchase-price. *Siebe v. Joshua Hendy Machine Works*, 86 Cal. 390; 25 Pac. Rep'r, 14. Authority to the president and secretary to purchase certain ranches, when the corporation had no funds to pay for them, was held to include authority to borrow money to pay the purchase-price, and to contract to pay one a commission for obtaining the loan; and this, though the by-laws forbid the contracting of a debt without the authority of the board. *Arapahoe Cattle & Land Co. v. Stevens*, 13 Col. 584.

Where the president and secretary were authorized to execute a note for a certain sum and interest, and they executed a note accordingly, which included a provision for an attorney's fee, it was held that the latter provision was not binding on the company. *Hardin v. Iowa R. & C. Co.*, 78 Iowa, 736.

5. **Power to make contracts generally.**—It has been held that the president has no power to accept a surrender or to cancel a lease of the property of the corporation, *Third Ave. R. Co. v. Ebling*, 12 Daly, 99; or to increase the compensation of an officer, whose compensation has been fixed by the board of directors, *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220; or to change the terms of a subscription by making it conditional instead of absolute, *Morgan County v. Thomas*, 76 Ill. 120; or to buy property with a view to extending the operations of the company, *Blen v. Bear River W. & M. Co.*, 20 Cal. 602. The president of a bank has no power to settle a defalcation of the cashier by accepting a deed of land, *Bank of Healdsburg v. Bailhache*, 65 Cal. 327; or to discharge a debt due the bank by accepting an order upon a third party, *First National Bank v. Kimberlands*, 16 W. Va. 555. See, also, *Olney v. Chadsey*, 7 R. I. 224. In *United States National Bank v. Homestead Bank*, 18 N. Y. Supp. 758, it is held that the president has presumptive authority to settle an unliquidated claim against his corporation, and his promise to pay a definite sum in settlement was held binding upon the corporation without proof of authority, and in the absence of proof to the contrary.

In *Risley v. Indianapolis, etc., R. Co.*, 1 Hun, 202, it was held that the president of a railroad company could not bind the company by an agreement with the plaintiff to give him \$50,000 for procuring contractors to construct its road. A corporation was organized "for the conversion and disposal of agricultural products by means of mills, elevators, stores or otherwise." The president purchased flour upon the credit of the corporation which he shipped to commission men and pledged for margins in wheat deals. In an action for the price of the flour, it was held that the corporation was not liable. The corporation was not shown to have authorized or ratified the purchase or to have received any benefit therefrom. The court held that, while the purchase of the flour was not necessarily *ultra vires*, yet the president could not bind the company for the purchase-price by virtue of his general authority, and that

the plaintiff must show a special authority from the board, or special circumstances rendering the purchase necessary in the business of the corporation, or a ratification. *Getty v. Barnes Milling Co.*, 40 Kans. 281.

A manufacturing company was held not liable for goods ordered by the president for its business, when a resolution existed forbidding such action on his part. *Westerfield v. Radde*, 7 Daly, 836 To same effect: *Rathburn v. Snow*, 3 N. Y. Supp. 925. Where the by-laws provided that all contracts involving a liability of \$500 or more should be in writing, signed by the president and treasurer, and sealed with the corporate seal, it was held the company was not liable upon a lease reserving a rent of more than \$500 and executed by the president alone. *Bohm v. Loewer's Gambrinus Brewery Co.*, 9 N. Y. Supp. 514. The president of a company employed a broker to procure a party who would pay off a ground rent on the property of the company and take other security at a less rate. This was a matter which the by-laws vested in the power of a committee. It was held that the president had no power to make the contract, and that the broker, who had succeeded, could not recover for his commissions. *Twelfth Street Market Co. v. Jackson*, 102 Penn. St. 269. But where a corporation has permitted the president for several years to act and represent himself as possessing certain powers, it cannot set up its by-laws to show he has not such powers as against one who has acted upon the faith of the appearances. *Marine Bank v. Butler Colliery Co.*, 5 N. Y. Supp. 291.

The following cases may also be cited as, in general, opposed to the power of the president to bind the corporation by contract: *Farmers' Bank v. McKee*, 2 Penn. St. 318; *Western R. Co. v. Bayne*, 11 Hun, 166; *Smith v. Smith*, 117 Mass. 72.

The president of a mining company, which had its general office in San Francisco, was also superintendent and managing agent of its mines and of its business at the mines. Held, that he had power to make a contract with plaintiff to take out ore from the mines and deliver it at the mills of the company, and that evidence that the contract was never authorized by the directors was incompetent. *Crowley v. Genesee Min. Co.*, 55 Cal. 273. Where the president was also general manager and had authority to contract for the sale and delivery of its manufactured goods, it was held he had power to release a contract made by him for the sale of goods. *Indianapolis Rolling Mill v. St. Louis, etc., R. Co.*, 120 U. S. 256. In *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67, the president and local manager of a foreign insurance company were held to have power, by virtue of their official positions, to agree that a mortgagor should have time to redeem, notwithstanding a foreclosure. It was said by the court that the arrangement was one which the company had power to make; that it was within the apparent power of the officers in question, and that to permit the company to deny such authority would enable it to commit monstrous frauds.

One who was president and general manager of a corporation organized for the mining, shipping and selling of coal, was held to have power, as such, to contract to pay a person a commission of ten cents a ton for selling coal at a given point. *Lee v. Pittsburgh Coal & Min. Co.*, 56 How. Pr. 373. The court says: "We may fairly presume, further, that the defendant's president and manager had, by virtue of his offices, authority to make those contracts in defend-



ant's behalf, which it was necessary that some agent should make for the prosecution of its business, and which the daily exigencies of that business might require. The hiring of the operatives to carry on the work of mining coal; the making of contracts for the shipment of coal to the various markets; the employment of agents to receive and take care of coal at those markets, to attend to its sale, and to collect and remit the proceeds, were necessary to the operations of the corporation, and it was also necessary that some agent should be clothed with authority to make such agreements. The public would have the right to assume that the president and manager of the company claiming such authority, and exercising it, did lawfully possess it, and to treat with him accordingly. Upon similar presumptions all business men deal with the executive officers of banking, insurance, railroad, manufacturing and other corporations, whose operations move the vast and complicated machinery of trade and commerce. Their boards of directors may, and no doubt often do, adopt rules and regulations defining the powers and duties of the various officers through whose agency the corporate powers and franchises are exercised. But such rules and regulations are usually to be found only upon the minutes of the directors' proceedings, or other private records of the corporation. They are not published, nor do the public, with whom the officers of the corporation transact business, know, or have the means of knowing, what such rules and regulations are. And it often happens — so often as to be the rule rather than the exception — that the chief officers of a corporation exercise a very wide range of powers, virtually grasping the entire direction and control of all its operations, with the tacit consent and approval of the corporation, though it has never by any direct vote or recorded act defined the nature or extent of their authority." This case was afterward affirmed by the Court of Appeals without an opinion. See 75 N. Y. 601.

In *Hayner v. American Popular Life Ins. Co.*, 35 N. Y. Super. Ct. 266, it is held that the president of an insurance company is presumably its agent for the transaction of its general business, and that he has power to waive a condition in an insurance policy. So in *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74, it is held that the president and secretary are presumably the officers to make ordinary agreements, and that no proof is necessary of their authority to agree to an arbitration of a claim for flowage. *Booth v. Farmers & Mechanics' National Bank*, 50 N. Y. 396, holds that the president of a bank is its financial officer and is authorized to receive payment of claims due the bank and give acquittance therefor, and the bank was held liable for the amount of a judgment in favor of the bank, which had been assigned by the bank to the plaintiff and satisfied by the president by mistake. The court says: "When an officer does an act which is within the general scope of his powers, although circumstances may exist which render the particular act a violation of his duty, the corporation is, nevertheless, bound by his act as to persons dealing in ignorance of these circumstances, and is responsible to innocent third parties who have sustained damages occasioned by such act."

An extreme case as to the powers of the president may be found in *Wilson Sewing Machine Co. v. Boyington*, 73 Ill. 534. Boyington, an architect, sued the company in question to recover for his services in drawing plans for a building. It appeared that the president of the company and the local man-

ager at Chicago had had various talks with the plaintiff about plans for a building to be occupied by the company. It appeared, however, that it was the president who was proposing to erect the building, and that the plans were in fact for him. The supreme court held that if the president and local manager so conducted the negotiations with the plaintiff that the latter supposed, and had a right to suppose, that he was dealing with the company, then the company was liable. Nothing appeared as to the objects or powers of the company except what its name implied, and nothing as to the authority of the officers in question, except what might be implied from their official positions. The plaintiff, therefore, had no right to suppose he was dealing with the company, except from the words and conduct of its officers. The corporation was presumably for the manufacture and sale of sewing machines. While the construction of a building in which to carry on its business may have been within its powers, it was clearly no part of its ordinary business. The case, in effect, affirms the broad proposition that if the president or officers of a corporation assume or represent that they have authority to make a certain contract, the corporation is bound to any one who chooses to rely upon their having such authority. This would enable the officers of a corporation to bind it by any contract whatever within the powers of the corporation. This is counter to the general doctrine that an agency cannot be proven by the declarations of the agent alone. *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 523. In that case it was held that the power of officers to bind a corporation could not be proven by the acts or declarations of the officers themselves.

Of course the president of a corporation cannot bind it by contracts which are *ultra vires*, *First National Bank v. Hoch*, 89 Penn. St. 324, and *Holt v. Winfield Bank*, 25 Fed. Rep'r, 812; or by contracts in which he is personally interested, when his interest is known to the other party. *Wilson v. Met. Elevated R. Co.*, 120 N. Y. 145 and *Rhodes v. Webb*, 24 Minn. 292.

6. *Power to receive payment on behalf of the corporation.*—The president is presumably authorized to receive payment of moneys due the company and to give acquittances therefor. *Booth v. Farmers & Mechanics' National Bank*, 50 N. Y. 396; *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280. It follows that a tender to the president is good as a tender to the company. *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280.

7. *Power to confess judgment against the corporation.*—It is held, we believe, without dissent that a president has no power to bind his corporation by a power of attorney to confess a judgment against the corporation. *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 287; *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 375. But in *Chamberlin v. Mammoth Mfg. Co.*, 20 Mo. 96, it was held that, after a suit was commenced against a corporation, the president, being the proper person to defend for the corporation, could appear and confess a judgment in the suit.

8. *Power to bind the corporation by admissions or representations.*—The president and cashier of a bank, in order to induce one to indorse a note, represented that a prior indorser had given security for its payment and that his liability would be merely nominal. It was held that these representations were not binding on the bank. *Bank of United States v. Dunn*, 6 Pet. 51; *Bank of the Metropolis v. Jones*, 8 Pet. 12. A new bank was created having

the same name and the same president and cashier as a bank previously in existence. In a suit to make the new bank liable on certain bills of the old bank, it was proven that the new bank had frequently paid out the bills of the old bank as cash and that its president and cashier had frequently represented that there was no difference between the bills of the two banks, but there was no proof that the new bank had ever issued the particular bills in suit. It was held that the representations of the president and cashier were not within the scope of their authority and not binding upon the new bank. *Wyman v. Hallowell & Augusta Bank*, 14 Mass. 58; *Salem Bank v. Gloucester Bank*, 17 Mass. 1. The president of a bank signed a paper reciting that a certain note was given merely as a voucher until it should be ascertained that the maker had paid for certain stock. Held, not binding upon the bank. *Hodge's Executor v. First National Bank*, 23 Gratt. 51. To the same effect as the foregoing cases: *Henry v. Northern Bank*, 68 Ala. 527; *Ryan v. Manufacturers & Merchants' Bank*, 9 Daly, 308.

One assuming to act as the agent of certain railroad companies, contracted with the plaintiff for the carriage of a large amount of iron to be delivered by the companies. After a breach of the contract, the plaintiff had negotiations for a settlement with the president of one of the companies, who admitted the authority of the agent to make the contract. In a subsequent suit upon the contract it was held that this admission was competent evidence against the company. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297. The court says: "The company were operating their road, and the business transactions appertaining and incident to the conduct of its affairs must, of necessity, be extensive and multifarious—incapable of execution by a board of directors, and requiring a chief officer and executive head, with power to act in the transaction of the ordinary business of the corporation, as the exigencies of that business may require. The business of such corporations can be carried on only through their officers, agents and servants; through them only can they act or speak, and the president is treated by the public, and made by usage, the chief officer and executive head of the corporation. Through him numerous everyday affairs of the corporation are transacted, and such acts as are incident to the execution of the trust reposed in him—of an ordinary character, arising in the routine of business—such as custom or necessity has imposed upon the office, he may perform for the corporation, without special or express authority. *Ryan v. Dunlap*, 17 Ill. 40. The old doctrine that corporations can only be bound by acts under their corporate seal, has been exploded. They have become numerous, and their operations extend into almost every enterprise of the country, demanding such powers and facilities, within their sphere of action, as belong to natural persons in the prosecution of the like enterprises; and being intangible and invisible beings, created by the law, they can exercise them through natural persons only. Unless they may be bound, in the ordinary affairs of the corporation, by the acts and admissions of their officers, so far as relates to the business usually transacted through such officers, they would enjoy an immunity incompatible with the rights of individuals, and destructive of the object of their creation. The president of a railroad corporation is treated by common usage as its head—an officer *within* and a *part* of the corporation, a mere artificial person, incapable itself of acting or speaking

—and admissions of such officer, made in the execution of the duties imposed upon him, and concerning a matter upon which he is called upon to act, and which matter is within the scope of the authority usually exercised by him, are evidence against the corporation.”

9. *Powers of the president virtute officii, generally.*— It is manifest from the foregoing review of the decisions that it is very difficult to say what are the powers of the president of a corporation by virtue of his office alone. The authorities do not concur in his right to exercise any power, *virtute officii*, except that of a presiding officer, and except such powers as may be conferred upon him by the organic law of the corporation. As to any other power which may be specified, it will be seen either that its existence has not been the subject of adjudication, or that one or more courts have denied or doubted its existence. In nearly all the cases which have been referred to above, the decision was that the president did *not* have the power which he assumed to exercise. In those cases in which his action was upheld it will generally be found that there were other grounds upon which to rest his authority than his official position merely. In some cases he was made general manager or given general control of the business of the company; in some there was a course of dealing or holding out which justified the belief that he had the power assumed and estopped the company from denying it; in some an express power was conferred which was held to embrace the particular power in question, and in others a ratification was shown.

Where the powers of the corporation are vested in a board of directors, as is usually the case, it is difficult to see how any of those powers can be lawfully exercised without the consent of the board, either express or implied. *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512; *Dabney v. Stevens*, 40 How. Pr. 341; *Risley v. Indianapolis, etc., R. Co.*, 1 Hun, 203; *Westerfield v. Reddy*, 7 Daly, 326; *Luse v. Isthmus Transit R. Co.*, 6 Oreg. 125; *First National Bank v. Kimberlands*, 16 W. Va. 555. Undoubtedly it must rest with the board of directors to say whether the powers of the corporation shall be exercised at all, and when, where and to what extent they shall be exercised. The president would clearly have no power to inaugurate the business of the corporation, or to bind it by any contracts or arrangements in that behalf, without the authority of the board. But after a corporation has become a going concern by the authority and direction of the board, a somewhat different question is presented. The board having authorized a certain business to be carried on, may the president, as the executive head of the corporation and without any express delegation of authority from the board, bind the corporation by his acts and contracts in connection with the carrying on of such business in the manner authorized by the board? There is authority in support of an affirmative answer to this question. *Bleu v. Bear River W. & M. Co.*, 20 Cal. 602; *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297; *Mitchell v. Deeds*, 49 Ill. 416; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74; *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 237; *Lee v. Pittsburgh Coal & Min. Co.*, 56 How. Pr. 378; *S. C.*, 75 N. Y. 801; *Hayner v. American Popular Life Ins. Co.*, 85 N. Y. Super. Ct. 266; *Third Ave. R. Co. v. Ebling*, 12 Daly, 99; *Neiffer v. Bank of Knoxville*, 1 Head, 162; *Indianapolis Rolling Mill v. St. Louis, etc., R. Co.*, 120 U. S. 256. Th-

following cases, by implication, support the same conclusion: *Getty v. Barnes Milling Co.*, 40 Kans. 281; *Bright v. Metairie Cemetery Assn.*, 33 La. Ann. 58; *England v. Dearborn*, 141 Mass. 590.

In *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 237, the court says: "The powers of the president of a corporation, *virtute officii*, over its business and property are strictly the powers of an agent — powers delegated to him by the directors, who are the managers of the corporation, and the persons in whom, as its representatives, the control of its business and property is vested. If the corporation be organized for business purposes, the president is its chief executive officer. He may, without any special power from the board of directors, perform all acts of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts, in matters arising in the usual course of its business. Boone on Corporations, § 144. To this extent the president, in virtue of his election as such, becomes the agent of the corporation. Beyond the powers which usage and custom, and the necessities and convenience of business require in the executive officer of a corporation, he has no more control over the corporate property and funds than any other director."

In another of the cases referred to the views of the court are stated as follows: "Whatever the opinion may formerly have been as to the powers of the president of a company formed for business purposes, the rule that courts at the present day seem inclined to adopt is, that the president of a corporation may, without being specially authorized, do all acts of an ordinary character in the every-day business of the corporation. He is held out to the public as the executive head of the corporate body, and under his direction the usual affairs of the corporation are constantly performed. \* \* \* When an act is in the line of the ordinary business of the company the presumption is that the president has authority to do it, though that presumption may be overthrown. (*Chicago, etc., R. Co. v. Coleman*, 18 Ill. 299; *Mitchell v. Deeds*, 4 Ill. 424; *Smith v. Smith*, 62 Ill. 496; *Lee v. Pittsburgh Coal Co.*, 56 How. Pr. 373.) But there is no presumption that the president may do any act that is not strictly in the course of the ordinary business of the company. It will not be presumed that he has power to sell property that is not kept for the purposes of sale in the regular course of business (*Hoyt v. Thompson*, 5 N. H. 820, 335), or that he can do any act that must be done under the corporate seal. Nor will it be presumed that he can voluntarily, and without consideration, release the claim of the corporation against one of its debtors (*Brouwer v. Appleby*, 1 Sandf. 158)." *Third Ave. R. Co. v. Ebling*, 12 Daly, 99 (1883).

It will be noticed that these expressions are very guarded, and yet they are perhaps as strong in favor of the powers of the president as the authorities will justify. In *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67, it is said that "as a general rule the president of a corporation has power to bind it *within the scope of its powers*." But this is manifestly incorrect. If such was the law, the president could virtually exercise all the powers of the corporation. The utmost that either authority or reason will justify, is that the president may bind the corporation, by his acts and contracts, in the ordinary every-day matters which arise in the course of its business. Where the board of directors has set the powers of the corporation in motion, and has authorized

its business or operations to be entered upon and carried on, it would seem reasonable that the president, as the head and chief executive officer of the corporation, should have power, without any special designation or direction of the board, to do all those things which are in the way of an *execution or carrying out* of what the board has thus authorized. According to this view, it would be sufficient to show in any case that the corporation was actually carrying on a certain business and that the act or contract in question was one ordinarily incident to the carrying on of such a business. To hold that the president has, by virtue of his office, any power beyond this would be to nullify the law which places the control of affairs in the board of directors and to place the corporation and stockholders at his mercy.

10. Powers of the president as affected by general custom and usage.—In *Bambrick v. Campbell*, 87 Mo. App. 460, it is said: "Presidents of corporations, by general custom, exercise certain powers in acting for the corporation. This custom has frequently been judicially recognized." In other cases it has been said that the officers of corporations have such powers as custom and usage attach to their respective positions. See *Walker v. Detroit Transit R. Co.*, 47 Mich. 338; *Fay v. Noble*, 13 Cush. 1; *Neiffer v. Bank of Knoxville*, 1 Head, 162; *Spangler v. Butterfield*, 6 Col. 356; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige, 127, 134; *Stokes v. New Jersey Pottery Company*, 46 N. J. Law, 237. When these cases are examined it will generally be found that the custom and usage referred to is that of the particular corporation in question or to that general division of functions which accords to the president duties of an executive nature, to the treasurer, duties relating to the funds and finances, and to the secretary duties relating to the records, papers, seal, etc. It would seem to be a sound proposition, however, that, if it was the common usage and understanding that a particular officer in a given class of corporations was accustomed to exercise certain powers, any particular corporation of the class would be bound by the acts of such officer in the line of such powers, though it had, in fact, withheld the power in the particular case. This is a proposition which applies more to those officers and agents whose powers and duties have become specialized, such as cashiers and tellers of banks, and agents of insurance companies, than to presidents. *Story Agency*, § 114.

11. Powers of the president as affected by the course of business of the corporation — holding out — estoppel.—It is competent for the board of directors to confer upon the president any powers which it is possible for them to delegate. This may be done, not only by an express by-law or order to that effect, but by their acquiescence in the president's assumption and exercise of such powers. Whatever powers, therefore, the president has been accustomed to exercise with their acquiescence or tacit approval, the corporation will be estopped from denying, as against one who has trusted in his possession of such powers. *Sherman Centre Town Co. v. Swigart*, 2 Am. R. R. & Corp. Rep. 158; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327; *Holmes, Booth & Haydens v. Willard*, 125 N. Y. 75; 25 N. E. Rep'r, 1063; *Kraft v. Freeman Printing & Pub. Assn.*, 87 N. Y. 628; *National Park Bank v. German Am. Mut. W. & S. Co.*, 53 N. Y. Supp. 367; *Marine Bank v. Butler Colliery Co.*, 5 N. Y. Supp. 291; *National Bank of the Republic v. Navassa Phosphate Co.*, 8 N. Y. Supp. 929; *First National Bank v. Kimberlands*, 16 W. Va. 555; *Smith v.*

Lawson, 18 W. Va. 212; Martin v. Webb, 110 U. S. 7; Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98; 11 Sup. Ct. Rep'r, 36.

Moreover the board of directors will be deemed to have tacitly authorized, not only a course of dealing which they have knowingly permitted, but one which by the exercise of proper diligence, they ought to have known. National Bank of the Republic v. Navassa Phosphate Co., 8 N. Y. Sup. 929; Martin v. Webb, 110 U. S. 7.

12. Powers incidental to those expressly conferred.— In this regard the same rules would apply in case of the president of a corporation as in case of any other agent. Authority to transact any particular business would carry with it authority to employ all the usual means of accomplishing it. 1 Spelling Priv. Corp., § 193; Cake v. Pottsville Bank, 116 Penn. St. 264; Arapahoe Cattle & L. Co. v. Stevens, 13 Col. 534. And the president's acts and declarations within the scope of the authority would bind the corporation. Holmes v. Turner's Falls Co., 150 Mass. 585. Many of the cases already cited illustrate these propositions.

13. Presumption of authority in case of acts performed by the president.— Contracts executed by the president or by the president and other officers and sealed with the corporate seal, are presumed to have been duly authorized. Phillips v. Coffee, 17 Ill. 154; Morse v. Beale, 68 Iowa, 463; Goodnow v. Oakley, 68 Iowa, 25; Asher v. Sutton, 31 Kans. 286; Jourdan v. Long Island R. Co., 115 N. Y. 380. But this arises out of the old doctrines pertaining to seals. Some courts have gone further and laid down the doctrine that the same presumption should be made in the case of all acts performed by the president, or in case of all acts pertaining to its business. Bambrick v. Campbell, 37 Mo. App. 460; Smith v. Smith, 62 Ill. 493; Goodrich v. Reynolds, 31 Ill. 490. "The president, being the legal head of the body, when an act is performed by him, the presumption will be indulged in that the act is legally done and binding upon the body." Bambrick v. Campbell, 37 Mo. App. 460. This case refers to Smith v. Smith, 62 Ill. 493, where, in speaking of the president, the court says: "In the absence of legislative enactment or provision made in the by-laws, corporations usually act through their president, or those representing him. He, being the legal head of the body, when an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body." In the latter case the presumption was indulged in favor of an instrument executed by the vice-president and acting president of a railroad company and sealed with the corporate seal. In People's Bank v. St. Anthony's Roman Catholic Church, 109 N. Y. 512, 525, the court, after referring to the doctrine in regard to instruments having the corporate seal affixed, says: "Now that it is no longer necessary for a corporation to contract under seal, it does not follow that the same presumption should attend an unsealed contract, purporting to have been made by the officers of a corporation. Such a presumption has never been indulged, so far as we have been able to find, to sustain an allegation that an unsealed contract, executed by officers of a corporation in its name, was a corporate obligation, unless authority was implied from the nature of the office, or from previous similar dealings recognized by the corporation or a ratification was shown."

In United States Nat. Bank v. Homestead Bank, 18 N.Y. Supp. 758, already

referred to, the president was held presumptively authorized to compromise a claim against the corporation. The court says: "Indisputably, the compromise agreement was within the corporate powers of the defendant, and where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified." This proposition would cover every possible contract which a corporation could make in the absence of any statutory provisions requiring contracts to be made by some other officer or officers. The cases cited are *Patterson v. Robinson*, 116 N. Y. 193; *Bank v. Kohner*, 85 N. Y. 189; *Lee v. Mining Co.*, 56 How. Pr. 373; 75 N. Y. 601. The last of these cases has already been referred to. *Bank v. Kohner* relates to the powers of cashiers. In *Patterson v. Robinson*, the language of the court is sufficiently comprehensive but the facts were different. The suit was against the trustees of a manufacturing corporation to charge them personally with the indebtedness of the corporation in excess of its capital stock. The plaintiff was receiver of a bank holding most of the indebtedness. If a certain agreement made by one Vall, acting as president of both the manufacturing company and the bank, with Robinson, one of the defendants, was valid, then the indebtedness upon which liability was predicated was paid, otherwise not. It was not a suit to charge the corporation directly upon the agreement but it was rather collaterally in question. There was no evidence of authority or ratification. The court says: "The contract was one which the boards of the corporations had power to authorize their presidents to make, or to ratify after it had been made, and the burden was on the plaintiff to show that the contract was not authorized or ratified by the boards. *Bank of Vergennes v. Warren*, 7 Hill, 91; *Gillett v. Campbell*, 1 Den. 520; *Elwell v. Dodge*, 33 Barb. 336; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 185, 193; *Smith v. Hull Glass Co.*, 11 C. B. 897, 929; *Lee v. Pittsburgh Coal & Min. Co.*, 56 How. Pr. 373; affirmed, 75 N. Y. 601; *Morawetz Corp.* (2nd ed.), §§ 336, 538, 598. The plaintiff failed to rebut the presumption that the contract was entered into or ratified by the authority of the boards of the corporations, and it must be held to be binding on both."

There is certainly no presumption that the president has authority to bind the corporation by acts outside of the ordinary course of business. Numerous cases cited above support this conclusion. As to acts in the ordinary course of business, it seems to us that he should be deemed to have power to perform them by virtue of his office, or, at least, that his acts in that behalf should be deemed *prima facie* valid and binding upon the corporation. See *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280; *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74; *Booth v. Farmers & Mechanics' National Bank*, 50 N. Y. 896; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Lee v. Pittsburgh Coal & Min. Co.*, 56 How. Pr. 373; *S. C.*, 75 N. Y. 601; *United States Nat. Bank v. Homestead Bank*, 18 N. Y. Supp. 75; *Patterson v. Robinson*, 116 N. Y. 193.

14. *The vice-president.*—In the absence of the president his powers and duties devolve upon, and may be exercised by, the vice-president. *Smith v. Smith*, 63 Ill. 498; *Coleman v. W. Va. Oil, etc., Co.*, 25 W. Va. 148.



## IN RE SPLIT ROCK CABLE-ROAD CO.

(Court of Appeals of New York, Oct. 6, 1891.)

**EMINENT DOMAIN. PUBLIC USE. ELEVATED TRAMWAYS.** In condemnation proceedings by an elevated tramway corporation organized under Laws of New York 1888, chapter 462, it appeared that the southerly terminus of petitioner was accessible only by a private road, and that up to the date of the petition the road had been used solely for transporting stone for a private corporation in which the incorporators of petitioner were interested. It was claimed that it was the intention to carry freight for any person offering the same to the extent of its surplus capacity after supplying the private corporation. Held, that, in view of the object of its corporate existence, and the manner in which it had been and was to be operated, the evidence failed to establish that the taking sought was for public use.

**A** PPEAL from supreme court, general term, fourth department. Petition of the Split Rock Cable-Road Company for the condemnation of land, of which Charles Hughes and others are the owners, or persons interested. There was an order of the special term granting the petition, which was reversed by the general term, and the petitioner appeals. Affirmed.

*Wm. G. Tracy* for appellant. *Thomas Hogan* for respondent.

O'BRIEN, J. The Split Rock Cable-Road Company, a corporation organized under chapter 462 of the Laws of 1888, entitled "An act to authorize the formation of elevated tramway corporations, and to regulate the same," applied by petition to the supreme court for authority to take for its corporate use certain lands of which the respondents are the owners. The right to take these lands was contested by the owners on several grounds — among them, that the use for which they were required by the corporation was not public. The special term granted the application, and directed the appointment of commissioners to appraise the value of the property, and this order has been reversed by the general term. There are some questions of minor importance, such as the omission of the petitioner to file a map, and the present necessity for acquiring the lands for any purpose, that, in our view need not be considered. The prominent question is, whether the application is for the taking of private property for a public use in fact, or for a purpose merely private. The provisions of the statute

under which the petitioner is incorporated, so far as they are material to the question, are as follows: "§ 1. Any number of persons not less than thirteen may form a company for the purpose of constructing, maintaining and operating an elevated tramway constructed of poles, piers, wires, rods, ropes, bars, or chains, for the transportation of freight in suspended buckets, cars or other receptacles for hire, and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the said tramway is to be constructed, maintained and operated, and the length of said tramway, as near as may be." The particular powers which such corporations may possess and exercise are enumerated and specified in the following provisions: "§ 6. Every corporation formed under this act shall have power and authority (1) to cause such examination and surveys for its proposed tramway to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by its officers and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto; (2) to lay out its tramway and to construct the same as hereby provided. § 7. In case any company formed under this act is unable to agree for the purchase, use or lease of any real estate required for the purposes of its incorporation it shall have the right to acquire title in fee to the same in the manner and by the proceedings provided by law for acquiring title to lands for railroad use by railroad corporations under the provisions of chapter 140 of the Laws of 1850, and the several acts amending the same, supplemental thereto, so far as the same are applicable. § 9. Every corporation formed under this act shall have power and authority to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and transaction of its business." The articles of association of the petitioner, which are acknowledged June 13, 1888, and filed June 19, 1888, state that the subscribers "have associated together as an elevated tramway corporation, to continue in existence for the period of fifty years, for the purpose of constructing, maintaining and operating an elevated tramway between Split Rock and Onondaga Lake, a distance of about four miles, both of which places are in Onondaga county." The capital stock of the petitioner was

all paid in, and in June, 1889, it completed its tramway from Split Rock, northerly to near the Erie canal, a distance of about three and a half miles, and since then it has been in operation. The tramway consists of two elevated cables held upon supports and parallel to each other, about ten feet apart, on which run buckets by means of a trolley or pulley — one line taking the buckets that have been filled, and the other line taking back the buckets which are empty. The location of the southern terminus of this tramway is upon the land of the petitioner, just north of the lands now desired to be taken, and is in a gorge about ninety feet lower than the Hughes land.

There is nothing in the statute under which this corporation was formed, nor in the objects of the corporation as expressed in the articles of association, sufficient to warrant the conclusion that the business which it is organized to carry on is public in the sense that enables it to take private property under the power of eminent domain. The special term, however, found as a matter of fact that the lands required by the corporation, and described in the petition, were for a public use; and it remains to inquire whether the general term was right in holding, as it did, that this finding was without evidence to support it. The facts and circumstances from which the nature of the use to which the corporation proposes to apply the property sought to be condemned are practically undisputed. The company has filed no map indicating an intention in any way to include the land in question within the boundaries of its property—a fact which, standing alone, would form a very serious obstacle to the success of the application. *In re Rochester Electric Ry. Co.*, 123 N. Y. 351; 25 N. E. Rep'r, 381. The map of its route originally filed, taken in connection with the evidence, shows that the southern terminus of the tramway is upon the land of the petitioner, and near the establishment of the Solvay Process Company, a corporation engaged in a large and growing business, consisting, as is to be inferred from the evidence, in the production of soda ash. This company owns one hundred acres of land, upon which are stone quarries, and this land entirely surrounds the terminus of the tramway as well as the lands in question. The northern terminus of the tramway, as now built, is also on the lands of the Solvay Process Company, at the lime-kiln of their works, about

five hundred feet from the Erie canal. The incorporators of the petitioner were practically all stockholders and persons interested in the Solvay Company, and it is quite apparent that the petitioner was organized and is operated as an instrumentality to facilitate the business operations of the Solvay Company. The only business that it has thus far carried on was for that company. As now constructed, the limit of its carrying capacity cannot exceed seven hundred and fifty tons per day. It has thus far been operated practically night and day, and has succeeded in carrying for the Solvay Company three hundred and fifty to four hundred tons of stone a day. There is no public highway leading to the northern terminus of the road by means of which the public can obtain access for its use. That the road has thus far been entirely for the benefit of the Solvay Company, and that its business is to be entirely subordinate in the future to the plans and interests of the same company, is entirely clear. From the evidence of the president of the petitioner and other witnesses in support of the application, the most that is claimed is that the surplus of the capacity of the road, after supplying the wants of the Solvay Company, is to be devoted to public use in carrying, in buckets, freight offered to it by any person, providing such freight is suitable to the buckets and the road. Whether there is to be any surplus capacity, as the Solvay Company continues to expand its business, and if so, how much, are questions which are left entirely uncertain. From the testimony it appears that the lands are required in order to increase the terminal facilities of the tramway company by building other tramways on the surface to facilitate the carrying of stone to the cable station, by erecting buildings for the storage of freight and for repair shops, and to furnish means of access. The company has other land that could be used for these purposes, but it is not so convenient. The evidence does not suggest any business that the petitioner is to carry on in the future, any more than in the past, beyond the carrying of stone for the Solvay Company, except possibly the carrying of coal. In regard to that, it is best to describe the project in the language of the president himself, who said: "We intend to make a contract with some private individual to furnish him with coal, so that he can transport it or sell it to people in that vicinity; to establish a coal-yard, the same as anywhere—

not that the Solvay Process Company or the cable company will establish a coal-yard. Some individual will have to run it, with whom we will make a contract to carry coal, and we propose to limit the contract to one individual for the present." Looking at the statute under which the petitioner was incorporated, the objects of its incorporation, as described in the certificate, and the evidence in regard to the manner in which it has been and is to be operated, and the purposes of its corporate existence, we think it is entirely clear that the use to which the petitioner is to devote the lands of the respondents is not public, but private. The principles governing applications by corporations of this character to take private property for their corporate purposes have been very fully discussed and stated in a recent case in this court. *In re Niagara Falls, etc., Ry. Co.*, 108 N. Y. 375; 15 N. E. Rep'r, 429. Under the doctrine of this and other cases a possible limited use by a few—and not then as a right, but by way of permission or favor—is not sufficient to authorize the taking of private property against the will of the owner. *In re Deansville Cemetery Assn.*, 66 N. Y. 569; *In re Eureka Basin W. & M. Co.*, 96 N. Y. 42; *In re Rochester, H. & L. R. Co.*, 110 N. Y. 119; 17 N. E. Rep'r, 678; *In re New York, L. & W. Ry. Co.*, 99 N. Y. 12; 1 N. E. Rep'r, 27. The order appealed from is right, and should be affirmed, with costs.

All concur, except Finch, J., absent.

1. **Eminent domain—public use.**—Questions similar to that involved in the foregoing case are considered in the following cases: *Chicago, etc., R. Co. v. Porter*, 2 Am. R. R. & Corp. Rep. 415; *Glaessner v. Anheuser-Busch Brewing Assn.*, 2 Am. R. R. & Corp. Rep. 420; *Fort Street Union Depot Co. v. Morton*, 8 Am. R. R. & Corp. Rep. 438.

The right to condemn private property for the construction of lateral railroads, spurs and switch tracks is discussed in note, 2 Am. R. R. & Corp. Rep. p. 424.

2. **Public use—waiver of right to raise the question.**—Where the owner, of land resists condemnation proceedings on the ground that the proposed railway is not a public use, her failure to appeal from a decision that the purpose was public, and her consent to the selection of commissioners, and litigation of questions of value, do not amount to a waiver of her rights so as to preclude her from afterward moving to set aside the entire proceedings as unauthorized by law, after the court of appeals has decided in another similar proceeding that the railway company in question is a mere private enterprise. *In re Niagara Falls & Whirlpool Ry. Co.*, 121 N. Y. 319; 24 N. E. Rep'r, 452.

\* Reported in 28 N. E. Rep'r, 506; 128 N. Y. 406.

## DAVIS V. CITY OF KNOXVILLE.

(Supreme Court of Tennessee, Sept. Term, 1891.)

1. MUNICIPAL CORPORATIONS. LIABILITY FOR NEGLIGENCE OF CITY JAILER. *RESPONDEAT SUPERIOR*. When one is confined in a city jail on a criminal charge, and is assaulted by other prisoners confined in the same room, he cannot hold the city liable for such assault, on the ground of the negligence of its officers in not taking proper measures to protect him.

**A**CTION by one Davis against the mayor and aldermen of Knoxville. Judgment for defendant, and plaintiff brings error. Affirmed.

*Fred Mynatt* and *D. A. Gaut* for plaintiff in error. *Mynatt & Gaut* and *J. W. Caldwell* for defendant in error.

LUTON, J. Appellant Davis sued the city of Knoxville to recover damages for an assault made on him while confined in the city calaboose, on a charge of drunkenness, by prisoners confined with him in the same room. The case was submitted to a jury, who, under a very perspicuous charge by Special Judge Howe, returned a verdict for the defendant. The negligence charged may be summarized as follows: (1) That the city calaboose was not sufficiently commodious to permit a separation of prisoners, with some regard to character of inmates and grade of offense. (2) That there were three rooms in the calaboose, two of which were unoccupied, and that under these circumstances it was negligence to confine him with other prisoners, some of whom were known to the officers locking him up to be turbulent characters. (3) That it was negligence not to prescribe and enforce the separation of prisoners known to be violent and quarrelsome from others of a different character. (4) That the city watchman in charge of this place of detention was negligent in not being where he could hear the outcry of plaintiff when assaulted, and that he did not come to his relief. (5) That it was negligence not to so locate its watchman that he might readily hear a disturbance among the prisoners confined, and promptly command the peace. The learned circuit judge charged the jury, in substance, that the city would not be liable for the negligence of its public officers, nor that of its watchman at the calaboose. He refused to charge

several propositions holding the defendant liable for the acts of negligence we have endeavored to summarize.

Municipal corporations, such as counties, cities and towns, are arms of the state, to whom has been delegated, for purposes of local government, a portion of the sovereign power of the state. Such corporations can only act through agents, and, as they are but arms of sovereignty, the principle of *respondeat superior* does not apply. But when such corporation exists by virtue of a charter, general or special, limiting its powers and prescribing duties, it implicitly contracts to carry out the prescribed purposes of its creation; and if its agents or servants are guilty of negligence while in the discharge of corporate duties which are for the peculiar benefit of the corporation, in its local or special interest, an action will lie against the municipality, the maxim of *respondeat superior* applying. *Mayor v. Lasser*, 9 Humph. 757; *Mayor v. Brown*, 9 Heisk. 6; *Memphis v. Kimbrough*, 12 Heisk. 133. But in so far as purely governmental powers are concerned, and in respect to the general administration of the general law of the state, and in respect to all duties which are essentially public, and not local and special, they are deemed to be agencies of the sovereign power, and not subject to be sued for the torts of their agents or officers, unless by statute an action is given. This is the principle on which the case of *Pesterfield v. Vickers* rests, wherein it was held that the city of Knoxville was not liable for the wrongful and tortious conduct of one of its public officers. 3 Cold. 205; 2 Dill. Mun. Corp., §§ 772, 773; *Pollock v. Louisville*, 26 Am. Rep. 260; *Trammell v. Russellville*, 34 Ark. 105; *McElroy v. Albany*, 65 Ga. 387; *Dargan v. Mobile*, 31 Ala. 469; *Richmond v. Long*, 17 Gratt. 375. However difficult it may be in some cases to determine whether a particular act or duty falls within the general governmental or public powers of the corporation, or pertains to its purely local and special side, yet, in the case under consideration, there can be no doubt but that the acts complained of fall within the general or public functions of the city of Knoxville. The preservation of order, the maintenance of sobriety, the arrest and detention of violators of the general law of the state, is not for the local and private benefit of the corporation. It draws no private emolument from the enforcement of an ordinance carrying out the general policy of the state, and, in the exercise of the powers incident to

all these matters, it is but an agency of the state and its officers; in effect, officers of the state. Its discretion as to the character of its jail cannot be controlled by judgments holding it liable for negligence, if, in the opinion of a jury, it is not sufficiently commodious or properly arranged. Neither is it liable for the negligence of its jailer in detention of its prisoners, or the torts of its officers in making arrests. For such negligence the injured party must look to the wrong-doer, and to an intelligent public sentiment, to remedy the evils which too often characterize the average city government. There was no error in the action of the circuit judge of which plaintiff can complain. Judgment affirmed.\*

**1. Municipal corporations—Injury to prisoner by fellow prisoner—liability.**—A municipal corporation is not liable for personal injuries sustained by one prisoner at the hands of another confined in the same cell or room of the city prison, notwithstanding the police officer who arrested the plaintiff, and put him in prison, may have been guilty of wrong or negligence in confining him with an intoxicated fellow prisoner, who was on that account violent and dangerous. *Wilson v. City of Macon* (Ga., Feb. 15, 1892), 14 N. E. Rep'r, 710.

**2. Town—liability for death of prisoner by burning of jail through negligence of its officers or agents.**—A town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein by town authority for a violation of its ordinances, though such fire was attributable to the wrongful act or negligence of the officers or agents of the town. *Brown's Admr. v. Town of Guyandotte*, 34 W. Va. 299; 12 S. E. Rep'r, 707.

**3. Injuries resulting from unhealthy condition of jail.**—The care and control of prisons being within the "police power," a county is not liable for the failure of its officers to keep the county jail in a healthy condition. *Board of Coms. v. Boswell* (appellate court of Indiana, March 8, 1892), 30 N. E. Rep'r, 534. This case follows the decision of the supreme court of the same state in *White v. Brown* (Ind.), 28 N. E. Rep'r, 846. To the same effect are *City of New Kiowa v. Craven*, 46 Kans. 114; 26 Pac. Rep'r, 426; *La Clef v. City of Concordia*, 41 Kans. 323; 21 Pac. Rep'r, 272.

**4. Defective drainage of school building—liability of city for damage to adjacent property.**—A city is liable for damages occasioned by the negligent plumbing and drainage of a school building, whereby water and filth is deposited in the neighboring cellars. *Briegel v. Philadelphia*, 135 Penn. St. 451; 19 Atl. Rep'r, 1038.

**5. Municipal corporations—distinction between corporate and public duties as affecting liability for wrongs of officers and agents.**—A municipal corporation is not generally liable for the wrongful act of an officer, and, in the few cases where it may be liable, it must be made to appear that such officer was not an independent public officer, and that the wrong complained

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\* Reported in 18 S. W. Rep'r, 254; 90 Tenn. 599.



of was done by such officer while in the legitimate exercise of some duty of a corporate nature, which was devolved upon him by law, or by the direction of the corporation. *Caspary v. City of Portland*, 19 Oreg. 496; 24 Pac. Rep'r, 1036. The general question is discussed in the cases above cited and also in the following: *Curran v. City of Boston*, 8 Am. R. R. & Corp. Rep. 130, and note; *Howard v. City of Worcester*, 4 Am. R. R. & Corp. Rep. 270; *Sproat v. Directors of Poor, etc., of Greene County (Penn.)*, 23 Atl. Rep'r, 380.

### BLACKWELL V. INSURANCE CO.

(Supreme Court of Ohio, Oct. 20, 1891.)

1. **FIRE INSURANCE. FORFEITURE BY TRANSFER OF PROPERTY.** A provision in a policy of fire insurance, to the effect that a sale or transfer of the property insured shall forfeit the policy, does not become operative to avoid the policy, unless the entire interest of the assured in the property insured is sold or transferred.

2. **TRANSFER OF PARTIAL INTEREST BY TAKING IN A PARTNER.** If the property insured consist of the stock of goods of a merchant doing business alone, the taking in by him of a partner in the business is not such a sale or transfer by him of his entire interest in the property as will avoid the policy.

3. **RIGHT OF INSURED TO MAINTAIN ACTION ON POLICY AFTER SUCH TRANSFER.** Where the policy has not been assigned or transferred, and the property thus insured is destroyed or damaged by fire after the partnership has been formed and had assumed the management of the business, the assured may maintain an action on the policy in his own name to recover the damages sustained by him on account of the injury done to his share of the property.

**ERROR** to superior court of Cincinnati. Action by one Blackwell on a fire insurance policy. Judgment for defendant. Plaintiff brings error. Reversed. The other facts fully appear in the following statement by Bradbury, J.:

The plaintiff in error brought an action in the superior court of Cincinnati against the defendant in error upon a policy of insurance issued by it to him upon a stock of dry goods, notions, etc., owned by him in said city. The defendant admitted issuing the policy and the loss of the goods by fire, and set up, in bar of a recovery for the loss, that the policy contained a provision that it should become "null and void" if the property insured should be sold or transferred by the assured; and averring that, in violation of this condition, after the policy was issued, and before the fire, he sold and transferred the goods and business to a firm composed of himself and one Horman; and that at the time of the loss the

goods were owned, and the business was conducted, by said firm, by which sale and transfer the policy became forfeited and void. The plaintiff interposed a demurrer to this defense, and, upon its being overruled, declined to plead further, and suffered judgment to be entered against him. This judgment was affirmed by the superior court in general term; whereupon this proceeding was brought to reverse both judgments.

*Joseph W. O'Harra* for plaintiff in error. *Ramsey, Maxwell & Ramsey* for defendant in error.

BRADBURY, J. (after stating the facts). The record in this case raises two questions, both of which must be determined in favor of the plaintiff in error to entitle him to relief: (1) Did the act of the assured, who before was a sole trader, in receiving a partner, constitute a sale and transfer of the insured property, within the meaning of the policy, and was the policy thereby rendered void? (2) If it was not such a sale as to render the policy void, may the plaintiff maintain an action on the policy in his own name to recover for the loss?

There is some conflict among the authorities upon the first question. It is discussed by May in his work on Insurance, and by the courts of a number of the states, notably in *Dix v. Insurance Co.*, 22 Ill. 272; *Finley v. Insurance Co.*, 30 Penn. St. 311; *Insurance Co. v. Ross*, 23 Ind. 179; *Insurance Co. v. Riker*, 10 Mich. 279; *Drennen v. Assurance Corp.*, 20 Fed. Rep'r, 657; *Malley v. Insurance Co.*, 51 Conn. 222; *Scanlon v. Insurance Co.*, 4 Biss. 511; *Cowan v. Insurance Co.*, 40 Iowa, 551; *Hathaway v. Insurance Co.*, 64 Iowa, 229; 20 N. W. Rep'r, 164; *Keeler v. Insurance Co.*, 16 Wis. 523; *Wood v. Insurance Co.*, 31 Vt. 552. An examination of the cases above cited will disclose that the conditions in the policies, where forfeiture for alienation was sustained, were materially different from the one involved in this action, except, perhaps, in the cases in 30 Penn. St. 311, and that in 16 Wis. 523, where the language of the condition was very similar to that now under consideration. In the other cases sustaining the forfeiture, the condition contained a provision forfeiting the policy, not merely for a "sale or transfer" of the property, but in case of "a change of title" or the sale of "any undivided interest therein" (23 Ind. 179); in case of a "change of title" (10 Mich. 279);

"or any change took place in the title or possession" (51 Conn. 222; 20 Fed. Rep'r, 657); and, therefore, they cannot be rightfully claimed as direct authorities for the insurance company in the case at bar. In the case in 40 Iowa, 551, the condition against alienation was very similar to those above quoted; but the supreme court of Iowa held "that nothing less than a sale of the entire interest of the party insured would defeat the policy." This doctrine was maintained by Drummond, J., in 4 Biss. 511.

Heretofore this precise question has not been before this court and in the conflict of authorities respecting it we feel at liberty to adopt that rule upon the subject which most nearly accords with the policy of our decisions and the presumed intention of the parties. It is the policy of this court to strictly construe those clauses in an insurance policy which forfeit the indemnity provided for the assured. *West v. Insurance Co.*, 27 Ohio St. 1. In this case, on page 10, Johnson, J., refers with approval and in the following language to the views on the subject contained on page 74 of *May on Insurance*: "Exceptions in a policy should be strictly construed, and where there are two interpretations equally fair, that which gives the greater indemnity should prevail." And on page 13 (27 Ohio St.) the same learned jurist says: "Stipulations in a contract providing for disabilities or forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced." Let us recur to the exact words of forfeiture as they are set forth in the defendant's answer: "If \* \* \* said assured should sell or transfer the property thereby insured, that said policy should become null and void." It was competent for the policy to provide, expressly, that a sale of a part of the property or of an interest therein should avoid the policy. This they did not do. The absence of a specific provision to that effect, when it could have been so easily inserted, together with the rule before referred to, that conditions which defeat a policy should be construed strictly against the forfeiture, leads us to hold that a sale of the entire interest of the party insured was necessary to avoid the policy. In a strict legal sense, perhaps, wherever one engaged in business alone takes a partner into his business, or a firm receives a new member, or a member goes out, the transaction results in the formation of a new concern accompanied by a sale and transfer of all the prop-

erty of the old establishment to the new one ; but it is at least doubtful whether this strict legal result is contemplated by the business world generally. That the parties in the case before us intended the policy should be avoided in case the assured received a partner into his business is uncertain. That the plaintiff understood the transaction to be a sale of an undivided half of the property and business to Hornman, rather than a sale of the whole of it to a firm composed of himself and Hornman, is quite probable. It was competent for the parties to provide in unambiguous terms that, if the assured received into the business, without the consent of the insurer, a partner, the policy should become void. This was not done, and we think the principles already announced require us to hold that the sale and transfer resulting from the reception of a partner did not avoid the policy. Notwithstanding the transaction, the plaintiff retained a substantial and insurable interest in the property covered by the policy, while, to avoid the policy on account of the provision against alienation, it should have divested him of his entire interest.

The defendant contends that this construction disregards the rule that, in construing an instrument, effect should be given to all its parts ; and that to hold that the plaintiff must divest himself of his entire interest to avoid the policy renders the provision against alienation nugatory, because, if the policy contained no such provision, yet he could not recover for a loss that occurred after he had sold his entire interest, as in that event he suffered no injury, and the contract of insurance is one of indemnity. Whether the construction we have adopted renders the provision against alienation nugatory or not, or whether circumstances may not arise under which it might be operative, we do not deem it necessary to inquire, for the rule thus urged upon our consideration is only one of many rules applied by courts to ascertain the meaning of the words adopted by parties to express their intentions, and in many instances it readily yields to other rules of construction, as we think it should in the case now under consideration.

The remaining question presents no difficulty. Section 4993 of the Revised Statutes requires an action to be brought in the name of the real party in interest. Here the plaintiff alone is interested in the policy of insurance set forth by him in his petition ; the

contract it contains is to indemnify him ; he can recover, of course, only to the extent he has been damaged ; but, as no question is before us as to its proper measure, it will not receive consideration.

Judgment reversed.\*

**Fire insurance—condition against change of title.**—Policies of insurance usually provide for a forfeiture in case of any change in the title of the property. A change resulting from the death of the assured, whereby the title is cast upon his heirs, has been held not to be within the condition. *Richardson's Admr. v. German Ins. Co.*, 1 Am. R. R. & Corp. Rep. 703 ; *Pfister v. Gerwig*, 2 Am. R. R. & Corp. Rep. 165. Where the property insured belongs to a partnership, the mere dissolution of the firm does not effect any change of title which avoids the policy. *Roby v. American Central Ins. Co.*, 3 Am. R. R. & Corp. Rep. 153. So held, also, of a change of interest of the partners among themselves. *Allemania Fire Ins. Co. v. Peck*, 2 Am. R. R. & Corp. Rep. 438. Where property was insured in the name of "E. S. K., receiver for Holladay v. Holladay," it was held that a change of receivers did not effect a change of title, so as to avoid the policy. *Thompson v. Phoenix Ins. Co.*, 3 Am. R. R. & Corp. Rep. 119.

Where a policy of insurance is conditioned to be void in case of a change of ownership of the property without the consent of the insurer, and the insurer reinsures the risk covered thereby in another company subject to all the conditions of the policy, the assured can only be required to look to the original insurer for consent to such a change of ownership. *Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 63 ; 26 N. E. Rep'r, 244.

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## LIGARE V. CITY OF CHICAGO.

(Supreme Court of Illinois, Oct. 31, 1891.)

1. MUNICIPAL CORPORATIONS. EMINENT DOMAIN. TWO ORDINANCES CONSTRUED AS ONE. Where a city council on the same day passes two ordinances, the one providing for widening a certain street, and the other granting a railroad company a right of way on the street as widened, and requiring it to pay the expense of condemning the land necessary for widening the street, as provided for in the other ordinance, the two ordinances will be treated as if they were a single ordinance.

2. POWER TO WIDEN STREET FOR BENEFIT OF RAILROAD COMPANY. A city council has no power to condemn land for widening a street for the express purpose of giving a railroad company the use of a portion of the street in such a manner as to exclude all other travel therefrom.

3. POWER OF CITY TO FILL UP AND DESTROY A NAVIGABLE WATER-WAY. A street cannot, by condemnation proceedings, be so laid out across a navigable water-way as to destroy the water-way.

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\* Reported in 20 N. E. Rep'r, 279.

4. The Revised Statutes of Illinois 1874, chapter 24, article 5, section 1, clause 81, which authorizes cities "to construct and keep in repair canals and slips for the accommodation of commerce," does not give them power to fill up slips.

**A**PPEAL from Superior Court, Cook county, John P. Altgelt, judge. This is a petition by the city of Chicago to condemn land under two city ordinances. The condemnation was ordered as prayed for. George A. Ligare, one of the owners of land sought to be taken, appeals. Reversed.

The first ordinance provides as follows: "§ 1. That, in consideration of the agreements hereinafter contained, the right is hereby granted to the Chicago, Madison and Northern Railroad Company, its lessees, successors and assigns, to construct, maintain and operate a railroad with two or more main tracks and necessary side or connecting tracks, turn-outs, switches and appurtenances, over such lands as it now has, or may hereafter in any manner acquire, the right to lay tracks upon, and over, across or along all intervening streets, alleys and public grounds along and upon the following route. \* \* \* § 5. Whereas, an ordinance has been introduced and is now pending in the city council for the widening of Archer avenue, between Bushnell street and Sanger street by appropriating therefor the land on the south side of said avenue, lying north of the following described line, to-wit: \* \* \* Now, in case said ordinance shall go into effect and said avenue is widened, permission and authority are hereby granted to the Chicago, Madison and Northern Railroad Company, its lessees, successors and assigns, to lay down, maintain and operate four railroad tracks, and to the Chicago and Alton Railroad Company, its lessees, successors and assigns, to lay down, maintain and operate two railroad tracks, on that portion of Archer avenue, when widened as aforesaid, lying between the two following lines, to-wit: One line north of, and nearly parallel to, and seventy (70) feet distant from, the south line of widened Archer avenue, as said land is above described; the other line north of, and nearly parallel to, the said described line, and one hundred and sixty (160) feet distant therefrom. The permission and authority granted in this section are upon the condition, however, that no steam railroad track shall be laid down or maintained on said Archer avenue, between Bushnell street and

Sanger street, except between the two lines last above described; and upon the further condition that the cost and expense of procuring the land necessary for the widening of Archer avenue as aforesaid, and all damages occasioned thereby, and the cost of grading and paving the same, and also so much of the said street adjoining it on the north as shall be occupied by the tracks of the Chicago, Madison and Northern Railroad Company and the tracks of the Chicago and Alton Railroad Company, shall be paid for by the Chicago, Madison and Northern Railroad Company, and a special assessment for the aforesaid cost and expense may be levied solely on the property of said railroad company. And the said Chicago, Madison and Northern Railroad Company shall build, at its own expense, in conformity to plans to be approved by the commissioner of public works, along the south side of its roadway, the entire length of Archer avenue, which it shall traverse, a substantial brick or stone wall, twelve feet in height, with stone coping, which said company shall keep in good condition and repair, and shall also construct a sidewalk along the south side of said wall whenever the same shall be ordered by the municipal authorities of said city. § 6. The rights and privileges hereby granted to the several railroad companies herein named in Archer avenue are subject to the rights and privileges therein of the Chicago City Railroad Company, and permission and authority are hereby granted, upon the completion of the widening of Archer avenue, as aforesaid, to the said Chicago City Railroad Company, if it elects so to do, to remove their tracks from their present location in that portion of Archer avenue so to be widened, and to relay them upon the south seventy feet of Archer avenue, as widened; provided, however, that said removal shall not be made until a permit therefor shall be obtained, and the proposed location of said tracks on said seventy feet has been approved by the commissioner of public works, and said tracks shall be relaid subject to the approval of the said commissioner. Such removal shall be a waiver and abandonment of the rights of said Chicago City Railway Company as to the portion of Archer avenue from which said tracks are removed. § 7. All that portion of Ogden slip lying south of the north line of Archer avenue, as the same shall be widened as recited in section 5, shall be permanently filled with earth, and the cost of the said improvement shall

be paid by the Chicago, Madison and Northern Railroad Company. \* \* \*

The second of said ordinances is as follows: "§ 1. That the portion of Archer avenue, lying between a point on the south line of said avenue one hundred feet east of the east line of Bushnell street and the easterly line of Sanger street, be, and the same is hereby, ordered widened, as follows, viz.: By taking or appropriating therefor the land on the south side of said avenue lying north of the following described line. \* \* \* § 2. Any legal proceedings necessary to accomplish the widening of Archer avenue as aforesaid are hereby authorized, and the counsel to the corporation is hereby directed to file a petition in a court of competent jurisdiction in Cook county, Ill., in the name of the city of Chicago, praying that 'the just compensation to be made for private property to be taken or damaged for said improvements or purpose specified in this ordinance shall be ascertained by a jury; and to file a supplemental petition in accordance with the provisions of section 53 of article 9 of an act of the general assembly of the state of Illinois entitled 'An act to provide for the incorporation of cities and villages.' § 3. The improvement hereby ordered shall be made and the cost thereof paid for by a special assessment to be levied upon the property benefited thereby, to the amount that the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation in accordance with article 9 aforesaid."

*C. C. Bonney and R. S. Thompson* for appellant. *E. H. Gary* for appellee.

SCHOLFIELD, C. J. It is, to our minds, clear that both ordinances before us in this case are but parts of a single and entire scheme. They were adopted on the same day, and the former expressly refers to, and is by its terms dependent upon, the adoption and enforcement of the latter; and it requires that the entire cost and expense of enforcing both ordinances, and all damages which may be adjudged against the city by reason of their being adopted and enforced, shall be paid by the railroad company. Moreover, the attempt to widen Archer avenue for the limited distance, and in the peculiar manner, described in the second ordinance is manifestly to meet a local want in that respect; and



the first ordinance conclusively shows that that local want is space for laying down additional railroad tracks, and nothing else. It is also of some significance, as confirmatory of this view, that the petition for condemnation alleges that the second ordinance contemplates the closing and filling up of Ogden slip, and that can only be upon the assumption that the first ordinance is supplemental to the second; for Ogden slip is not mentioned or referred to, directly or indirectly, in the second ordinance. The case must, then, be treated precisely the same as if both ordinances had been embodied in one; and we shall, therefore, treat them as a single ordinance, for widening a street in the manner proposed, at the same time giving the use of all of the old street, at the place where the street is widened, and a part of the new street added by the widening, exclusively to steam railroad companies for laying and operating their tracks, and also for closing and filling up a public water-way. Archer avenue is sixty feet wide. One steam railroad track is now laid on it, and operated by the Chicago and Alton Railroad Company. The ordinance adds, at the point under consideration, one hundred feet to the street, and takes thirty feet of that and adds it to the sixty feet, making ninety feet; and upon this authorizes the Chicago and Alton Railroad Company to lay and operate two additional tracks, and the Chicago, Madison and Northern Railroad Company to lay and operate four tracks—making, in all, seven tracks to be laid and operated by steam-engines within this ninety feet, or one track for every twelve and six-sevenths feet; and then requires that the part thus to be used shall be cut off from the remaining seventy feet of the street to be added, by a stone or brick wall twelve feet in height. The space to be occupied by the railroad tracks has also a line for street-cars, operated within it, but permission is given to remove that to the seventy feet south of the wall.

We shall take no time to demonstrate that the sixty feet of old street and the thirty feet of new street, thus to be occupied by seven steam railroad tracks, are exclusively devoted by the ordinance to the use of railroad companies. Hemmed in by the wall on the one side, and by the buildings or inclosures on private property on the other, no rational being would, at the risk of the inevitable dangers from passing engines and cars, use that part of the street as a common highway, unless under stress of most extraordinary

circumstances. It is not material that the public are not, by the words of the ordinance, forbidden the use of this part of the street. The effect of the grant is inevitably an exclusion of all but these railroads from its use, and the law deals with results, and not with mere forms, in such matters. Undoubtedly it has been held, in many cases in this court, that it is a legitimate use of a street to allow a steam railroad track to be laid and operated upon it when there is legislative authority therefor; but it has never been held that, under legislative authority merely authorizing tracks to be laid in streets, it is competent for a municipality to grant the exclusive use of a street to a railroad company.

The leading case on this question is *Moses v. Railroad Co.*, 21 Ill. 516. It was there sought to enjoin the laying of a railroad track in a street; and it was held that it was admissible for a common council, invested with legislative authority to that end, to authorize a railroad track to be laid in the street, because streets are for no exclusive mode of passage of persons and property, and, therefore, all modes may be tolerated. The gist of the reasoning is in the following sentence from the opinion of the court: "A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used." In *Stack v. City of East St. Louis*, 85 Ill. 377, action was brought against the city for permitting a railroad company to obstruct a street by a necessary embankment made for its track in approaching a bridge, and the action was maintained upon the ground, in part, that a railroad company cannot be allowed to exclude other uses of the street. And it was, among other things, said in the opinion: "It has, however, been held that a city or village may authorize the laying of railroad tracks in their streets; that such a use is not inconsistent with the trust for which they are held by the city. But, in thus permitting them to be used, the city has no right to so obstruct the street as to deprive the public and adjacent property-holders of their use as streets. The primary object is for ordinary passage and travel, and the public and individuals cannot be rightfully deprived of such use." To like effect, also, is *Canal Co. v. Garrity*, 115 Ill. 155; 3 N. E. Rep'r, 448; *City of Olney v. Wharf*, 115 Ill. 523; 5 N. E. Rep'r, 366. And so it has been held, in *Missouri*, it is not competent for a city to authorize such use of a street, dedi-

cated as a street, as will destroy it as a thoroughfare for the public. *Dubach v. Railroad Co.*, 89 Mo. 486; 1 S. W. Rep'r, 86. See, also, *Railway Co. v. City of Louisville*, 8 Bush, 419.

It is so familiar that we need not stop to demonstrate it, that cities, villages and towns are only empowered to lay out, open and improve streets for such public use, and that persons and property within the municipality may be legitimately assessed or taxed for payment therefor, and that persons and property within a municipality cannot be legitimately assessed or taxed for the right of way, or making or improving of a road for a railroad company alone. This being conceded, authority will in vain be sought for a municipality to devote a street which has been improved and maintained by municipal expense to an exclusive use for which it has no authority to lay out, open or improve it. We do not deny that the city has power to widen streets generally, and that when it has undertaken to do so the motives that may have actuated those in authority are not the subject of judicial investigation, but the purpose for which a thing is done is very different from the motives which may have actuated those by whom it is done, and is, in the present instance, a legitimate subject of judicial investigation, for the right to exercise the power of eminent domain is in all cases limited by the purpose for which it shall be exercised. Thus private property may be condemned for public use, but it may be shown that the use in fact is not public, but private. *Railroad Co. v. Wiltse*, 116 Ill. 454; 6 N. E. Rep'r, 49; *Sholl v. Coal Co.*, 118 Ill. 427; 10 N. E. Rep'r, 199.

Statutes conferring power to exercise the right of eminent domain are to be construed strictly. Unless both the letter and spirit of the statute relied upon clearly confer the claimed power, it cannot be exercised. *City of East St. Louis v. St. John*, 47 Ill. 463; *Railroad Co. v. Wiltse*, and *Sholl v. Coal Co.*, *supra*. It is not a question whether the person or corporation seeking to exercise it might not do so with as great safety to persons and property as any other person or corporation, or whether it would work out an equitable result to allow a particular person or corporation to exercise it in a given case. The question is purely one of legal power. That person or corporation which the statute says may exercise it for a stated purpose may exercise it for that purpose, but for no other purpose, and no other person or corpo-

ration not thus authorized can exercise it for that purpose. And so we held in *Railway Co. v. Galt*, 133 Ill. 657; 23 N. E. Rep'r, 425, and 24 N. E. Rep'r, 674, that a railroad company, under authority to condemn property for its right of way, cannot condemn property for a street of a city; and, obviously, if this be true, the reverse must also be true. A city cannot, under authority to condemn property for streets, condemn property for a railroad track, for the principle must be the same. But may the city here do indirectly — by mere change in the form — that which it cannot do directly? Although the city may not condemn property for the use of the railroad company, yet, inasmuch as it may allow railroad tracks to be laid in its streets, may it not first condemn property for itself, and then afterward allow the railroad tracks to be laid upon it to the extent of excluding all other uses? But we have seen that, under the power merely to authorize railroad tracks to be laid in streets, a city has no right to authorize railroad tracks to be laid upon streets so as to exclude the other public uses of the street, so long as it shall remain a public street; and here it is shown that the condemnation is for the express purpose of enabling the city to give a part of the old street and thirty feet of additional space to the exclusive use and occupation of railroad companies. The substance is not to be lost sight of through any mere jugglery in the use of words. This proceeding is, in fact, not for the city, but for the railroad companies. Condemning for the railroad companies, and condemning for the city to then give to the railroad companies, are, in legal effect, and so far as concerns this case, precisely the same thing.

We also fail to find any authority in the law to condemn and fill up Ogden slip. The evidence is much less satisfactory as to what this slip is than it should have been. There is enough, however, to show that it is a navigable water-way, connected with the south branch of Chicago river, and appurtenant to appellant's lots. A map in evidence shows its location, and it was spoken of by witnesses, without objection, as appurtenant to these lots and as a water-way. Thus George M. Bogue said he had examined appellant's lots fronting on Ogden slip; considered it as having a dock frontage. Edward Campbell said that he was familiar with Ogden slip. "Travel has never been obstructed by vessels, heavily laden, getting stuck there in the slip, mostly in the sum-

mer time, vessels laden with coal. The slip was used but little last summer; mostly by canal-boats for the stone-yard. Larger vessels have not used the slip lately." Edward O. Huling said that appellant's property has a water front, and could receive from slips. "The closing up the slip"—i. e., Ogden slip—"would shut off all water front." There are other references in the testimony of the witnesses of like character, but these, we think, are sufficient. The right of navigation and the right of crossing the water-way are equal. Both are to be exercised, and the rights of each are to be guarded. *Illinois Packet Co. v. Peoria Bridge Assn.*, 38 Ill. 467. When a franchise is granted to construct ways in streets across a water-way, there is no implied right to destroy the water-way, but it must be so bridged that its use will not be unnecessarily impaired. *Elliott Roads & St.*, p. 32 et seq. If it be conceded that the state may authorize the taking or destruction of a water-way, it devolves on those who claim that the state has done so to show it; and, since that is not done by simply showing power to lay out, open and improve streets across water-ways, no such power is here shown. Power is given the city by the thirty-first clause of section 1, article 5, chapter 24, Revised Statutes 1874, page 218, "to construct and keep in repair canals and slips for the accommodation of commerce." But we have found no power granted to the city to close them and fill them up. We think, counting, as we do, the two ordinances as one, the condemnation adjudged is for a purpose unauthorized by law; and the court erred in admitting the ordinances in evidence, and in rendering judgment as it did. The judgment is reversed.\*

**Eminent domain — the statutory authority — purpose of the taking.**—The grant of authority to condemn private property for public use, like all grants by the government, is to be strictly construed. *Gray v. Liverpool & Bury R. Co.*, 9 Beav. 391; *Martin v. Rushton*, 42 Ala. 289; *Spafford v. B. & B. R. Co.*, 66 Me. 26; *Benney's Case*, 2 Bland. Ch. (Md.) 99; *Lea v. Johnson*, 9 Ired. Law, 15; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Watson v. Acquacknuck Water Co.*, 36 N. J. Law, 195; *Reynolds v. Spears*, 1 Stew. 34; *Alabama Great Southern R. Co. v. Gilbert*, 71 Ga. 591; *Chicago, etc., R. Co. v. Wiltsie*, 116 Ill. 449; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 83 Mo. 121; *Cox v. Tifton*, 18 Mo. App. 450; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; *Central R. Co. v. Hudson Terminal Co.*, 46 N. J. Law, 289; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Pittsburgh, etc., R. Co. v. Bruce*,

\*Reported in 23 N. E. Rep'r, 964.

102 Penn. St. 23; *Simpson v. South Staffordshire Water-Works Co.*, 84 L. J. Eq. 330.

The purpose for which property is sought to be condemned, in any particular case, must, therefore, not only be for a public use, but must be clearly within the statute under which the proceedings are had. *Chicago & N. W. R. Co. v. Galt*, 1 Am. R. R. & Corp. Rep. 365, and cases cited in note.

For a city to condemn land ostensibly for a street, but really to be occupied by a railroad company, is a manifest abuse and perversion of the statutory authority to take land for public streets and highways.

The following cases in these reports are in point upon the question whether a particular purpose or condemnation is within the statutory authority intended to be exercised: *Chicago & N. W. R. Co. v. Galt*, 1 Am. R. R. & Corp. Rep. 365; *In re Barre Water Co.*, 3 Am. R. R. & Corp. Rep. 186, *Thomas & Houston El. Co. v. Simon*, 3 Am. R. R. & Corp. Rep. 398; *Wisconsin Central R. Co. v. Kneale*, 4 Am. R. R. & Corp. Rep. 123

## MCQUIGAN V. DELAWARE, L. & W. R. Co.

(Court of Appeals of New York, Dec. 1. 1891.)

**RAILROAD COMPANIES. ACCIDENT CASES. PHYSICAL EXAMINATION OF PLAINTIFF.** Courts have no power to compel one who sues for personal injuries to submit his person to examination in advance of the trial, at the instance of the adverse party.

**A** PPEAL from the supreme court, general term, fourth department. Action by Michael McQuigan against the Delaware, Lackawanna and Western Railroad Company. Defendant appeals from an order refusing to compel plaintiff to submit to a physical examination. Affirmed.

*Louis Marshall* for appellant. *Andrew Hamilton* for respondent.

**ANDREWS, J.** The sole question presented by this record is whether the supreme court has power, in advance of the trial of an action for a personal and physical injury, to compel the plaintiff, on an application made in behalf of the defendant, to submit to a surgical examination of his person by surgeons appointed by the court, with a view of enabling them to testify on the trial as to the existence and extent of the alleged injury. The question is not new in the courts, although, so far as we know, it was first presented in 1868, before a judge of the New York superior court

at special term, in the case of *Walsh v. Sayre*, 52 How. Pr. 334, who affirmed the existence of the power. The contrary was held by the general term of the third department in *Roberts v. Railroad Co.*, 29 Hun, 154. In 1877, the supreme court of Iowa, in the case of *Schroeder v. Railway Co.*, 47 Iowa, 375, sustained the doctrine that the court had an inherent jurisdiction to grant a compulsory order that the plaintiff submit to such examination, and this decision has been followed by the courts of several of the western and southern states, and in others the power has been denied. The same question was considered in the United States supreme court in the recent case of *Railway Co. v. Botsford*, 141 U. S. 250; 11 Sup. Ct. Rep'r, 1000, decided in May, 1891, and the court (two judges dissenting) decided adversely to the claim that the court had power to compel such examination. The opinions of the several courts which have passed upon the question present very fully the considerations bearing upon it. We concur in the view taken by the supreme court of the state and the supreme court of the United States, and we can add very little to the full discussion to be found in the opinions of those courts. The powers of courts are either statutory or those which appertain to them by force of the common law, or they are partly statutory and partly derived from immemorial usage, which latter constitutes their inherent jurisdiction. They are organized for the protection of public and private rights and the enforcement of remedies. Presumptively, therefore, whatever judicial procedure is essential to enable courts to exercise their function is authorized. The maxim that there is no right without a remedy justified the courts, in the earlier periods of the common law, in inventing writs and modes of procedure adapted to present for adjudication in proper form every question of judicial cognizance. The powers and jurisdiction of the courts of common law and chancery in England are to be found in the English statutes, and in the rules, precedents, decisions and procedure of the courts. The power which the courts actually exercised, supplemented by statutory powers, constitutes in a general sense their jurisdiction. Upon the organization here of the federal and state governments, courts were constituted, and in this state they succeeded to the powers therefore exercised by the courts of law and chancery in England, so far as they were applicable to our situation. It is a significant

fact that not a trace can be found in the decisions of the common-law courts of England, either before or since the Revolution, of the exercise of a power to compel a party to a personal action to submit his person to examination at the instance of the other party. If the power existed, it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law, and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The non-exercise of a power is not conclusive against its existence, but it is in conceivable that, if the power in question existed, it should have been unused for centuries, and never have been called into activity. In two cases cited by Justice Gray in his opinion in *Railway Co. v. Botsford*, supra, the court of common bench in England refused an order for the inspection of a building, on the application of the plaintiff in an action for work and labor performed by him thereon, on the ground of want of power. *Newham v. Tate*, 1 Arn. 244; *Turquand v. Strand Union*, 8 Dow. 201.

These cases tend to negative the existence of the power in the English courts, claimed for our courts in the case at bar. The only authority in the English common-law courts in any degree analogous is found in the power which the courts of England have occasionally, though rarely, exercised — to issue, on the application of apparent heirs, the writ *de ventre inspiciendo*, to compel a widow claiming to be with child by her deceased husband to submit her person to examination. The practice in England is *sui generis*, and has never been adopted here. It may have originated in the peculiar favor shown to heirs by the law of England, but, whatever its origin, it seems repugnant to common right, and the fact that in this instance only have the courts of England exercised the power to compel the examination of the person in a civil proceeding tends to show that the power is not there regarded as general, but special and peculiar, and limited to the particular case. The doctrine of the cases in chancery (*Briggs v. Morgan*, 2 Hagg. Const. 324; *Devanbagh v. Devanbagh*, 5 Paige, 554; *Newell v. Newell*, 9 Paige, 25), that in an action to procure a decree of nullity of marriage on the ground of impotence or sexual incapacity the chancellor may compel the defendant to



submit to a surgical examination, is a graft from the civil and common law, and, as has been said, "rests upon the interests which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction." Gray, J., in *Railway Co. v. Botsford*, *supra*.

When we examine the history of the power of common-law courts to compel the production and inspection of books and papers in possession of the opposite party in a civil action, we find that originally the courts disclaimed any power in the matter, and the remedy by bill of discovery was the only resource of the party desiring such discovery. Finally the common-law courts assumed a limited equitable jurisdiction over the subject, and, in addition to the rule that a party pleading a deed should make forfeit of the instrument which enabled the other party to demand over, the courts by order compelled a party who in his pleading relied upon a written instrument, not a deed, to give inspection to the other party if required, and so in other special cases. The courts in this state, prior to any statute, exercised a limited equitable jurisdiction of the same character. *Lawrence v. Insurance Co.*, 11 Johns. 245; *Denslow v. Fowler*, 2 Cow. 592, note. But this limited jurisdiction was exercised sparingly and with hesitation, and it was not until statutes were enacted in England and in this state, conferring upon common-law courts the same power to compel the discovery and inspection of books and papers which was exercised by courts of chancery on bills of discovery, that courts of common law claimed or exercised full power over the subject. St. 14 & 15 Vict., chap. 99; St. 17 & 18 Vict., chap. 125; Rev. St., p. 199, § 21.

The limited jurisdiction exercised by these courts before the statute was in the nature of a usurpation, and, so far as we can discover, it was never considered that they possessed an inherent power in aid of justice to grant relief in cases outside of the narrow limit mentioned. The power to compel an inspection of books and papers relevant to the controversy, in possession of either party, is of a similar nature to that invoked in the present case, and, if the inherent power of the court did not extend to the one case, it is difficult to suppose that it embraced the other. The power to compel a party to submit to a

examination of his person has never been conferred by any statute. The provisions of the Revised Statutes authorizing the court to compel the production of books or papers have been re-enacted in the Codes of Procedure. The statutes also contain specific provisions for the examination of a party on oath before trial, at the instance of the other party. The omission in these statutes of any reference to the power not under consideration is quite significant. We cannot say that the exercise of the power claimed might not in some cases promote the cause of justice, and prevent the consummation of fraud. On the other hand, unless carefully guarded, it would be subject to grave objections. But we have to deal only with the question of the power of the courts in the absence of any legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mould the proceedings to meet new conditions and exigencies is true, but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person or property. No court, we suppose, can abrogate an established rule of evidence, as, for example, the rule that hearsay evidence is inadmissible, or the rule of the common law that parties shall not be witnesses, or that interest disqualifies. They may apply existing rules to new circumstances. Nor is it, we conceive, within the power of the court to create remedies unknown to the common law, or institute a procedure not according to the course of the common law. It is most important that courts should proceed under the sanction of an orderly and regulated jurisdiction, and that as little as possible should be left to the discretion of a judge. The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this state. Its existence is not indispensable to the due administration of justice. Its exercise, depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any

existence. We have purposely omitted to repeat the views and authorities upon this question set forth in the opinions in *Roberts v. Railroad Co.*, and in *Railway Co. v. Botsford*, and we refer to those opinions for a fuller discussion of the grounds upon which the denial of the power claimed proceeds. The order should be affirmed. All concur.\*

**Accident cases — physical examination of plaintiff.** — The cases upon the power of the court to require the plaintiff, suing for personal injuries, to submit to an examination of his person, and upon the practice in such cases are collected in the note to *Ala. Great Southern Ry. Co. v. Hill*, 8 Am. R. R. & Corp. Rep. 418. The recent decision of the supreme court of the United States upon the question is reported in 4 Am. R. R. & Corp. Rep. 645. The question has also recently arisen in Indiana, and has been decided adversely to the power of the court to require the plaintiff to submit to such an examination. *Pennsylvania Co. v. Newmeyer* (Ind. Oct. 28, 1891), 28 N. E. Rep'r, 860. There is no new reasoning in the case, and the court does little more than refer to the cases, and follow the opinion of the supreme court of the United States. See, also, *Terre Haute & I. R. Co. v. Bruner*, 128 Ind. 542; 26 N. E. Rep'r, 178.

The same question was presented to the supreme court of Illinois in the late case of *St. Louis Bridge Co. v. Miller* (Ill., Nov. 2, 1891), 28 N. E. Rep'r, 1091. It was assigned for error in that case that the trial court denied a motion to compel the plaintiff to submit to an examination of her person by medical experts. The court held that the application was rightly denied, even if the power to grant it was conceded to exist. In disposing of the question the court says: "Considering the last-named question first, we find, upon examination of the record, that several days before the cause was called for trial a motion was filed by the defendant 'for a rule upon the plaintiff to submit to an examination of her person by medical experts, for the purpose of having the evidence on the trial of the cause as to the extent or the permanency of the injury she claims to have received.' This motion was supported by an affidavit of one of the defendant's attorneys, which stated simply that, on the day the motion was filed, he advised one of the attorneys for the plaintiff that the defendant desired to have the person of the plaintiff examined by competent experts, learned in the profession of medicine and surgery, for the purpose of ascertaining the extent of the injuries complained of in the plaintiff's declaration, and that said attorney then and there stated to him that the plaintiff would not allow such examination without an order of the court. No other proof was offered in support of said motion, and the court thereupon heard the motion and denied it, and to that decision the defendant's counsel duly excepted. As we view the case, it seems quite unnecessary for us to express any opinion upon the general question as to whether, under proper circumstances, and where it is shown by satisfactory proof that the due administration of justice requires such action, a court may not have the power to compel a plaintiff, in an action

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\* Reported in 29 N. E. Rep'r, 235; 129 N. Y. 50.

for a personal injury, to submit to such personal examination as may be necessary for the purpose of furnishing reliable and satisfactory evidence of the nature, extent and permanency of the injury complained of. It is sufficient to say that here no case is made calling for the exercise of such power, if it in fact exists. The theory upon which said motion was interposed seems to have been that requiring such examination was a matter of right, and that an order requiring it should be granted as a matter of course. Counsel appear to have labored under the impression that their right to require the plaintiff to submit to an examination by physicians was practically co-extensive with their right to compel her to appear and testify as a witness. As a consequence, no proof whatever was presented showing the necessity or propriety of such examination, or that the ends of justice would in the least be promoted thereby. It was not shown that the defendant had not already at hand abundant testimony to prove the nature and permanency of the plaintiff's injuries, or that she had not already been examined by a sufficient number of competent and trustworthy physicians, whose testimony was available, or that her injuries were of such character that a personal examination would have been likely to throw any light upon the question of their severity or probable permanency. As we have seen the only fact shown was that the defendant's attorney had advised the plaintiff's attorney that the defendant desired to have an examination made, 'for the purpose of ascertaining the extent and permanency of the injuries complained of in the plaintiff's declaration,' and that the plaintiff's attorney had replied that the plaintiff would not permit such examination, except in obedience to an order of court. It will be observed that the purpose of the examination expressed by the defendant's attorney was not to obtain evidence to be used upon the trial, but to ascertain what the facts were. Clearly, there could be no right to an examination for that purpose alone, and the plaintiff's attorney very properly refused to permit it to be made. It may also be remarked that, as no proof was offered showing the necessity of the evidence to be derived from such personal examination, nothing appeared from which it could be seen that the defendant would be prejudiced by the denial of its motion. As the contrary was not shown, the court had a right to presume that the defendant had other evidence as to the same facts at hand, and was in no way dependent upon the results of a personal examination to make out its defense. Without intending, then, to intimate an opinion that, under any circumstances, the court could properly have required the plaintiff to submit to the examination asked for, we are fully satisfied that the motion as presented was properly denied." *St. Louis Bridge Co. v. Miller*, 28 N. E. Rep'r, 1091, 1092.

## GLASGOW ET AL. V. CITY OF ST. LOUIS ET AL.

(Supreme Court of Missouri, Division No. 1, Nov. 23, 1891.)

1. MUNICIPAL CORPORATIONS. VACATING STREET. Where the charter of a city confers power to vacate streets, its action, in any particular case, cannot in the absence of fraud, be reviewed by the courts.

2. ACTION BY ONE WHOSE PROPERTY DOES NOT ABUT ON THE VACATED PORTION. An injunction will not lie to restrain the enforcement of a city ordinance vacating a street on which none of plaintiffs' property abuts, and plaintiffs merely suffer an inconvenience in common with all other persons.

3. THE INJURY TO SUCH PROPERTY NOT A DAMAGE WITHIN THE CONSTITUTION. In such case plaintiffs' property is not damaged within the meaning of the Constitution of Missouri, article 2, section 21, declaring that "private property shall not be \* \* \* damaged for public use without just compensation," since no injury peculiar to them is shown.

4. POWER OF CITY NOT DEPENDENT UPON MANNER IN WHICH STREET ACQUIRED. Where a city has the power to vacate streets it makes no difference, in the exercise of that power, whether the public acquired the street to be vacated by condemnation or by dedication.

**A**PPPEAL from St. Louis circuit court, Shepard Barclay, judge. Affirmed. Action by William Glasgow and others against the city of St. Louis and others to enjoin them from carrying a city ordinance into execution. Judgment for defendants. Plaintiffs appeal.

*M. L. Gray* and *Geo. Dennison* for appellants. *T. A. Post* and *Leverett Bell* for respondents.

BLACK, J. William Glasgow, Ann E. Lane, W. G. Haydock and the St. Louis Paint Manufacturing Company brought this suit against the city of St. Louis, the mayor thereof, Messrs. Shickle, Harrison and Howard, and the Shickle, Harrison & Howard Iron Company, a corporation, to enjoin them from carrying into execution ordinance 14,068, vacating that part of Papin street between Twelfth and Fourteenth streets. The circuit court dissolved the temporary injunction, and dismissed the petition, and from that judgment the plaintiffs appealed. Twelfth street runs north and south, and the next parallel streets to the west are Thirteenth and Fourteenth streets. Papin street begins at Twelfth street, and runs west crossing Thirteenth and Fourteenth and other streets. Gratiot street is the first street north, and Chouteau avenue the

first street south, of Papin, both running east and west, parallel to the last-named street. The plaintiffs own the two blocks between Thirteenth and Fourteenth streets, one north and the other south of Papin street. They have improved and have large manufacturing establishments on these respective parcels, comprising, in all, the two blocks. The defendant iron company owns the two blocks between Twelfth and Thirteenth streets, one north and the other south of Papin street; and it is this portion of that street which the ordinance in question vacates. These two blocks are covered by buildings and sheds, and are both used in carrying on the business of manufacturing iron pipe. In March, 1883, the municipal assembly passed an ordinance vacating and turning over to the iron company that part of Papin street now in question for a period of twenty years, for the consideration of \$2,000, and other considerations not necessary to be mentioned. On the petition of some of the present plaintiffs the city was enjoined from carrying that ordinance into effect. 87 Mo. 678. Subsequently two other bills were introduced before the assembly, simply vacating the same part of the street, both of which failed to pass. On the 21st of June, 1887, the municipal assembly passed the ordinance now in question, which is in these words: "So much of Papin street as lies between Twelfth and Thirteenth streets is hereby vacated as a public street." It is alleged in the present petition that the officers and agents of the city combined with the defendants to wrong and injure the plaintiffs and the public by vacating the street and converting the same to private use—that is to say, to the use of the defendants, the Shickle, Harrison & Howard Iron Company — and pursuant to said combination, passed the last-mentioned ordinance.

1. Considerable evidence was received by the trial court, showing why and under what circumstances this vacating ordinance was passed. The rule of law is well established that the courts will not inquire into the motives of the legislature in enacting a law, even where fraud and corruption is alleged. Cooley Const. Lim. (5th ed.), p. 225. But the rule is somewhat relaxed as to municipal bodies. Speaking of such bodies, it is said: "We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of the persons injured." Dill. Mun. Corp.

(4th ed.), § 311. Members of both branches of the municipal assembly looked into the facts with care, and say they became satisfied that it would be a public benefit, rather than a harm to close the street. The street commissioner says there had been no public demand for the street for ten years. The vacated part of the street lies in a manufacturing district, where the streets are unnecessarily close, according to other evidence. There is no doubt but the municipal assembly, in enacting the ordinance, intended to aid and foster a large manufacturing industry; but it is equally clear that the ordinance was passed with due regard to the public interests. The evidence entirely fails to show any fraud on the part of the city authorities, or any combination to injure any one. Nor does the evidence show that the ordinance was an unreasonable one. Whether the street should be kept open or vacated was purely a matter of expediency, and that was a question for the municipal assembly, and not the courts, to decide. *State v. Clarke*, 54 Mo. 36; *Railway Co. v. City of Springfield*, 85 Mo. 676; *Kittle v. Fremont*, 1 Neb. 329.

2. The charter of the city of St. Louis gives the mayor and assembly power by ordinance "to establish, open, vacate, alter, widen, \* \* \* all streets, sidewalks, alleys," etc. Under such a power the municipal assembly may vacate a street or part of a street without any judicial determination; and such a power, where exercised with due regard to individual rights, will not be restrained at the instance of a property-owner claiming that he is interested in keeping open the streets dedicated to the public." *Dill. Mun. Corp.* (4th ed.), § 666. There is no doubt but a property-owner has an easement in a street upon which his property abuts, which is special to him, and should be protected; but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property is surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief. *Bailey v. Culver*, 84 Mo. 531. Nor are the plaintiffs entitled to any relief by reason of the clause in the present constitution which declares "that private property shall not be taken or damaged for public use

without just compensation." To entitle them to relief because their property will be damaged, though not taken, they must show a special injury. Here there is no physical interference with their property, nor is any right or easement connected therewith or annexed thereto affected. They will, therefore, suffer no injury which is special or peculiar to them. The inconvenience, if any in reality there is, is the same as that cast upon other persons. For these reasons the constitutional amendment furnishes them no ground for complaint. *Rude v. City of St. Louis*, 93 Mo. 408; 6 S. W. Rep'r, 257; *Canman v. City of St. Louis*, 97 Mo. 92; 11 S. W. Rep'r, 60; *Van de Vere v. Kansas City* (Mo. Sup.), 17 S. W. Rep'r, 695 (not yet officially reported); *City of Chicago v. Union Bldg. Assn.*, 102 Ill. 379; *Hesing v. Scott*, 107 Ill. 600. It must be remembered that the city is here pursuing a power to vacate streets conferred upon it in express terms, so that *Cummings v. City of St. Louis*, 90 Mo. 265; 2 S. W. Rep'r, 130, and some other cases cited by the appellants, have no application whatever to this controversy. It appears Mary E. Lane and her husband, William Carr Lane, both now deceased, and the present plaintiff, Ann E. Lane, by a plat dated the 21st June, 1854, dedicated Papin street to public use from Twelfth to Fourteenth street, except about forty-three feet thereof, next to Twelfth street. The wife of the plaintiff William Glasgow is the daughter of said Mary E. and William Carr Lane, and, we suppose, inherited the interest in the two blocks between Thirteenth and Fourteenth streets now owned by the Glasgows. The iron company acquired title to the two blocks owned by it through the Lanes. These facts do not in the least modify or affect the conclusion before stated. The city has the power to vacate streets, and in the exercise of this power it can make no difference whether the public acquired the particular street by condemnation or by dedication. In either case it is for the municipal assembly to say whether the public interests require the street to be kept open. It is very true that the question whether a certain use is public or private is a question for the courts to determine; but it is for the assembly to say whether a given street shall be opened or vacated. The further fact that one of the present plaintiffs was a party to the plat which dedicated the street to public use is wholly immaterial. The question as to



whom the street will revert is not before us, and as to that we express no opinion whatever. The judgment is affirmed. All concur.

**Vacating street—rights of abutting owners.**—These rights are discussed in note to *Hielscher v. City of Minneapolis*, ante, p. 115. See, also, *Egerer v. New York Central, etc., R. Co.*, post, which is an important case in point.

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VAN DE VERE V. KANSAS CITY ET AL.

(Supreme Court of Missouri, Division No. 1, Nov. 23, 1891.)

1. **EMINENT DOMAIN. TAKING OR DAMAGING. FIRE-ENGINE HOUSE ON ADJACENT LOT.** The erection of a fire-engine house by a city upon a lot adjacent to the plaintiff's premises, although it will, to some extent, depreciate the value of his property, does not work a *taking* or *damaging* of his property within the meaning of the constitution, and a bill will not lie to enjoin such action by the city.

2. **QUESTIONS OF LOCATION AND NUISANCE AS GROUNDS FOR INJUNCTION.** The erection of a fire-engine house cannot be enjoined because it may be so managed as to become a nuisance, nor because a location might be found away from the residence part of the city. It is not for the courts to say where it shall be located.

**A** PPEAL from circuit court, Jackson county, J. H. Slover, judge. Reversed. Bill in equity by Madison Van de Vere against Kansas City et al. to enjoin the erection of a fire-engine house on a lot adjoining one owned by complainant. From a decree for complainant, respondents appeal.

*F. F. Rozelle, W. S. Cowherd and F. H. Dexter* for appellants. *Karnes, Holmes & Krauthoff* for respondent.

**BLACK, J.** Plaintiff is the owner of two lots on Brooklyn avenue in Kansas City, and the defendant city is the owner in fee of a lot adjoining the plaintiff's lots. After the city had let a contract and commenced the construction of a fire-engine house upon the lot owned by it, the plaintiff commenced this suit, praying for an injunction. The circuit court found that the plaintiff would be greatly damaged by the use of the building for a fire-engine house, and enjoined the city and the contractors from proceeding with the work until compensation should be made to the plaintiff for such damage. From that decree the city appealed.

The plaintiff produced evidence to the following effect: That his lots are suitable for residence purposes only; that a number of residences had been erected in the immediate neighborhood; that he had in contemplation the erection of a residence on his lots; and that his property would be decreased in value from thirty-five to fifty per cent by the erection of this building of the city — one witness says to the amount of \$2,500. The evidence of three physicians is that the noise and commotion incident to such a structure would be uncomfortable and annoying to persons living in adjoining houses, and might have a damaging effect upon their nervous systems. These same witnesses say that other property on the same street and in the same block would also be injured, but not to the same extent. On the other hand, a physician of twenty-five years' standing testified that he owned and resided on property next to one of these engine-houses, and that his property was not depreciated in value nor was the health of his family affected thereby. Another witness gave evidence to the same effect. The proposed structure is to be set back ten or fifteen feet from the street line. It is designed for one hose-wagon, a span of horses and five men. The alarm apparatus consists of a gong, with telephone attachments. Fire-bells are not used, but the alarms are loud enough to awaken the men.

1. An examination of the evidence leads us to the conclusion that the damages are over-estimated by some of the witnesses, but for all the purposes of this case it will be assumed that the plaintiff's property will, to some extent, be depreciated in value by the erection of the fire-engine house, and the use of the same for the designed purpose. Our constitution of 1875 [article 2, section 21] declares "that private property shall not be taken or damaged for public use without just compensation." The same clause in prior constitutions did not contain the word "damaged;" and the first question is whether the change in the organic law secures to the plaintiff compensation for the damages which he will sustain under the circumstances of this case. Previous to the constitution of 1875 a very restricted meaning had been given to the words "taken" and "property." Thus it was held in *St. Louis v. Gurno*, 12 Mo. 415, and affirmed in *Taylor v. St. Louis*, 14 Mo. 20, that the city was not liable in damages resulting to a property-owner

from grading and paving a street, where the work was done under an ordinance authorized by the charter. The reason assigned was that to grade a street dedicated to public use was not the appropriation of private property to public use, but simply the exercise of a lawful power over what had become public property, and that the property-owner had no remedy for such consequential damages. And in *Hoffman v. St. Louis*, 15 Mo. 651, the same rule was applied where the grade of the street had been changed. The rule of these cases was disapproved in *Thurston v. City of St. Joseph*, 51 Mo. 510; but in the case of *Schattner v. City of Kansas*, 53 Mo. 162, the court returned to the old doctrine, and so the law continued down to the adoption of the constitution of 1875. The only exceptions were in those cases where the city charters or authorized ordinances prescribed a different rule. Cooley, in speaking of what would constitute a taking, says: "Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action." Cooley Const. Lim. (5th ed.) 671. And it is said in *Transportation Co. v. Chicago*, 99 U. S. 635: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action." Such were the rulings under former constitutions. The eminent domain clause was amended, so as to include cases where property is "damaged" as well as "taken," to overcome the hardship growing out of the old rules; and what we are at this time concerned with is whether the amendment embraces cases like the one in hand. Thus far we have held that the amendment does extend to those cases where property is damaged by reason of a change in the grade of a street on which the property abuts, and this, too, though the city had the charter power to change the grade. *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Railway Co.*, 94 Mo. 574; 7 S. W. Rep'r, 579. In the case of *Rnde v. City of St. Louis*, 93 Mo. 408; 6 S. W. Rep'r, 257, the plaintiff owned property on High street five hundred feet

distant from a point where railroad tracks crossed that street. The tracks were depressed, by authority of authorized ordinances, from four to six feet, to conform to a system of bridges then in process of erection. The street was allowed to remain in this condition, impassable for teams, for three years. The suit was one to recover damages for alleged permanent injuries to the property and depreciation in the rental value thereof because of the obstruction in the street, and we held the plaintiff could not recover. A like result was reached in *Fairchild v. City of St. Louis*, 97 Mo. 85; 11 S. W. Rep'r, 60, and in *Canman v. Same Defendant*, 97 Mo. 94; 11 S. W. Rep'r, 60. These cases were like the *Rude Case*, except that in one the plaintiff's property was three hundred and fifty and in the other one hundred and twenty-five feet from the same obstruction. It was then held that, to bring a case within the amendment, the plaintiff, if suing for consequential damages, must show that he suffered an injury special and peculiar to his property, and that it was not enough to show a damage the same in kind as that suffered by other persons, though different in degree. The plaintiffs in those cases were not deprived of access to the street, nor were any of their property rights disturbed. The inconvenience was the same as that of other persons desiring to pass on and along the street. It seems to be held under the English lands clauses consolidation act that to recover for lands "injuriously affected" the plaintiff must show that he has sustained a peculiar damage. 3 Sedg. Dam. (8th ed.), § 1092. Judge Dillon shows with great clearness that the old line of decisions overlooked the fact that an easement or incorporeal right annexed to land—as that of ingress and egress, and light—is as much property as the right to the land itself, and that the various constitutional amendments were designed to protect these rights; but that it was not the intention of these amendments to create a right and to give a remedy in all cases of consequential damages for injuries to private property. He says: "A city, for example, under legislative authority might condemn land for the purpose of establishing a hospital thereon or a prison, which, if established, would have the consequential effect to injure or depreciate the market or actual value of property in the neighborhood. Such injuries, however, would not, in our judgment, be within the constitutional amendment. The amendment must as

it seems to us, be limited to cases where the *corpus* of the owner's property itself, or some appurtenant right or easement connected therewith or by the law annexed thereto, is directly (that is, in general, if not always physically) affected, and is also specially affected (that is, in a manner not common to the property-owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property." 1 Dill. Mun. Corp. (4th ed.), § 587d. Mr. Lewis, though following a very liberal interpretation of the words "injured" and "damaged," says: "Unless the owner is disturbed in the enjoyment of some right which he is entitled to make use of in connection with his property, he cannot recover. If the loss or depreciation arises from the mere proximity of the work or improvement, or from its unsightly nature, or its incongruity with the uses to which the neighboring property is put, there can be no recovery. There are no decided cases to which we can refer on this point, but we can easily illustrate our meaning. Suppose the public authorities purchase or condemn a lot in a fashionable residence locality, and erect and maintain a jail thereon, and suppose the direct effect is to depreciate the surrounding property twenty-five or fifty per cent. Is the property so depreciated damaged, injured or injuriously affected within the meaning of the provisions in question? We answer in the negative, because the owners have not been disturbed either in the enjoyment of their estates or in any right connected with their estates." Lewis Em. Dom., § 236. The amendment must be construed and applied in view of the evils which it was designed to remedy. We have seen that before this amendment there were many cases where the *corpus* of the property was not taken, yet rights directly annexed to the property were injured, and that for such consequential damages the property-owner had no remedy, because the act was authorized by law. Whether the plaintiff must now, in all cases, when claiming that his property has been "damaged" for public use, show that the injury is one for which he might have maintained an action if the act had not been done by authority of law, we need not say in this case. What we do say is this: that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected. The plaintiff in this case has failed in both of these respects. In the first place

his property is not directly affected by the proposed structure; he is not deprived of any access to the street, or any other incorporeal right annexed or attached to his property. Again, the annoyance which he or those occupying the property as a residence will be obliged to endure is not different from that to other persons within the sound of the gong or the commotion incident to the house, though it may be greater in degree. His property is not specially affected. If the plaintiff is entitled to damages in this case, then compensation must be allowed for any depreciation in the market value of property arising from the erection of a court-house, jail or other public building. The text-writers cited say such cases are not within the amendment, and to this we agree.

2. The defendant, it is admitted, has the charter power to erect fire-engine houses within the city; and it cannot be said that such a structure is a nuisance. That it may become one by improper use may be conceded, but that furnishes no ground for enjoining the erection of the house. There is some evidence that this building could be placed within a block or two of the present site, among shops and small stores, so as not to annoy residences; but so long as the house is not made a nuisance by improper use, it is not for the courts to say where it shall be placed. People who congregate in cities must be prepared to submit to some inconveniences. The judgment in this case is reversed, and the bill dismissed. All concur.\*

**Eminent domain**—construction of the words “damaged,” “injured” and “injuriously affected.”—The construction of these words as used in constitutions and statutes giving compensation for property “damaged,” “injured” or “injuriously affected” by works for the public use, is treated in note to *Omaha, etc., R. Co. v. Janacek*, 8 Am. R. R. & Corp. Rep. 268. The conclusion there reached is that there can be no recovery for mere depreciation in value, unless the depreciation is caused by some physical injury to the property, or by an interference with some private right appurtenant to the property, or with some public right, which the owner is entitled to make use of in connection with the property. It follows that the foregoing case is correctly decided, and the principle of the decision would cover the case of a school-house, jail, court-house, market or other public building, erected upon adjacent property. In almost every city there are localities in which the erection and use of such a building would depreciate the surrounding property. In such case there is no invasion or physical injury of the property affected, nor an interference with any right, public or private, connected therewith. The only ground of complaint is, that one owner, by a perfectly legitimate use of his property,

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\* Reported in 17 S. W. Rep'r, 742.

has depreciated the value of the adjoining property. The same result might have happened by the establishment of a store or factory. Every owner takes the chance of having the value of his property enhanced or diminished by the uses made of the surrounding property and the character of the improvements put upon it. He has no cause of complaint on account of the nature of such uses or improvements, unless they amount in law to a nuisance.

The words in question are construed with reference to various states of facts in the following cases: *Town of Longmont v. Parker*, 2 Am. R. R. & Corp. Rep. 91; *Peel v. City of Atlanta*, 2 Am. R. R. & Corp. Rep. 413; *City Council of Montgomery v. Maddox*, 2 Am. R. R. & Corp. Rep. 426; *Gainesville, etc., R. Co. v. Hall*, 3 Am. R. R. & Corp. Rep. 251; *Omaha, etc., R. Co. v. Janacek*, 3 Am. R. R. & Corp. Rep. 268; *Chambers v. South Chester*, 4 Am. R. R. & Corp. Rep. 278; *Heilscher v. City of Minneapolis*, ante, p. 115; *Glasgow v. City of St. Louis*, ante, p. 192.

### CITY OF ST. LOUIS V. CONNECTICUT MUT. LIFE INS. CO.

(Supreme Court of Missouri, Division No. 1, Nov. 23, 1891.)

1. MUNICIPAL CORPORATIONS. POWER TO COMPEL ABUTTER TO REMOVE SNOW AND ICE FROM SIDEWALK. The city of St. Louis, under its charter, may require abutting owners by ordinance to remove snow and ice from the sidewalk in front of their property, and may enforce the same by penalty, and such an ordinance is a valid exercise of the police power.

2. FAILURE OF ABUTTER TO COMPLY WITH ORDINANCE. LIABILITY OVER TO CITY FOR DAMAGES RESULTING. The violation of such an ordinance does not make such owner liable to the city for damages paid by it to one who received injuries by reason of the property-owner's failure to keep his sidewalk clean.

**A** PPEAL from St. Louis circuit court. Affirmed. Action by the city of St. Louis against the Connecticut Mutual Life Insurance Company to recover money paid by plaintiff by reason of defendant's failure to keep the sidewalk in front of its building free from snow and ice. Defendant's demurrer to the plaintiff's petition was sustained, and plaintiff appeals.

*W. C. Marshall* for appellant. *Lee & Ellis* and *Montague Lyon* for respondent.

**B**RACE, J. This is an appeal from the judgment of the circuit court sustaining a demurrer to plaintiff's petition. The cause of action set up in the petition is that the plaintiff, by the final judgment of the circuit court of the city of St. Louis, was compelled

to pay one Mattie C. Norton the sum of \$1,291.18, damages and costs, for injuries received by her from a fall in passing over a sidewalk on Locust street, in said city, in front of defendant's property, made dangerous and unsafe by an accumulation of snow and ice thereon, which the defendant suffered and allowed to remain in violation of the city ordinances; wherefore the city asks judgment for the amount it was so compelled to pay. The ordinances recited in the petition require the owners to keep the sidewalks and gutters in front of their property clean, and, after any fall of snow, to cause the snow to be immediately removed from the sidewalk fronting their property into the carriage-way of the street, and declare any person failing to comply with this requirement guilty of a misdemeanor, upon conviction of which such person is to be fined not less than \$5 nor more than \$20.

Before the judgment against the city in favor of Mrs. Norton became conclusive, the case was reviewed on appeal in this court. *Norton v. City of St. Louis*, 97 Mo. 537; 11 S. W. Rep'r, 242. In that case the city undertook to devolve upon the defendant here primary liability for the injuries Mrs. Norton received by reason of the unsafe and dangerous condition of the sidewalk on which she fell. We there held that it was the duty of the city to keep its sidewalks in a reasonably safe condition for persons traveling thereon, and that it could not evade or cast this duty upon others; and took occasion to say: "Conceding that the city has the power to cause obstructions upon the sidewalk to be removed at the expense of the owners of the ground fronting thereon (charter, art. 3, § 21, par. 9), and that the ordinances requiring such owners immediately after any fall of snow to cause the same to be removed is a legitimate mode of exercising that power, yet the city could not by passing such an ordinance relieve itself of its duty to the plaintiff, and to the public traveling on its streets, of keeping its sidewalks in a reasonably safe condition for travelers thereon, or transfer or impose that duty upon another; nor can its liability for a failure to discharge that duty be made contingent upon the liability of the citizen to the city for a failure to discharge his duty to the city in the matter of removing the snow as required by ordinance. For a neglect of this duty of the citizen the city might impose such a penalty as would be calculated to secure its performance, if



it has the power to impose such a burden ; but it could not create a liability to a civil action for damages by a private individual against one who failed to discharge the city's duty in that behalf." While there is respectable authority for the position that a municipal corporation cannot impose upon the citizen the obligation to keep the public sidewalk in front of his premises free from obstruction by snow, etc., at his own expense (*Gridley v. City of Bloomington*, 89 Ill. 554 ; *Chicago v. O'Brien*, 111 Ill. 532), the weight of authority is, however, the other way, and in favor of the position tentatively stated in the foregoing *dicta*, as to such power. (Many of the cases are cited in brief of plaintiff's counsel.) From the exercise of this power by the city through its ordinances creating such a duty upon the part of the defendant in the present case, counsel for plaintiff deduce the conclusion that, for a failure of the defendant to discharge its duty to the city under the ordinances, the city has a right over to recover back from the defendant the damages it was compelled to pay to Mrs. Norton. But this does not follow. The damages recovered by Mrs. Norton were for a breach of the city's duty to keep its streets reasonably safe from defects resulting from the operation of natural causes. To Mrs. Norton the defendant owed no such duty. The only duty it owed in regard to the sidewalk was to the city. That duty was created by the city in its ordinances, in which it prescribed for itself and its citizens the measure of damages for its neglect in the penalty imposed for their violation. The damages the city was compelled to pay may have been the result of its failure to promptly and efficiently enforce its ordinances. But it was its duty to enforce them, and not that of the citizen. The duty of the citizen is to obey, and, if he fail to obey, to pay the penalty which the city imposes for such failure, and not the damages which the city may be compelled to pay for its neglect to perform its duty. The doctrine on this subject is tersely stated in 2 Shear. & R. Neg., § 343, as follows: "An abutting owner, as such, owes no duty to maintain the street or sidewalk in front of his premises, and is not responsible for any defects therein which are not caused by his own wrongful act. He may, consequently, like any other person using the sidewalk in front of his premises, recover for an injury from a defect therein against the city, whose duty it was to keep it in repair. The fact that he violates a city ordinance, which re-

quires abutting owners to remove snow and ice from the sidewalk in front of his premises within a certain time after their accumulation does not render him liable to one injured by falling upon such snow or ice, nor to the city which had suffered judgment for the same injury." In support, see *Kirby v. Association*, 14 Gray, 249; *Van Dyke v. Cincinnati*, 1 Disn. 532; *Heeney v. Sprague*, 11 R. I. 456; *Flynn v. Canton Co.*, 40 Md. 312; *Moore v. Gadsden*, 93 N. Y. 12; *City of Hartford v. Talcott*, 48 Conn. 526; *City of Keokuk v. Independent Dist. of Keokuk*, 53 Iowa, 352; 5 N. W. Rep'r, 503; 2 Black Judgm., § 575; 2 Dill. Mun. Corp. (4th ed.), §§ 1012, 1035. We have found no case in conflict with the doctrine thus stated. The case of *Borough of Brookville v. Arthurs*, 130 Penn. St. 501; 18 Atl. Rep'r, 1076, certainly is not; for there the right to recover by the borough is predicated expressly upon an agreement, for a good consideration, to keep the sidewalk in repair. The demurrer was properly sustained, and the judgment of the circuit court is affirmed. All concur.\*

1. **Municipal corporations — power to compel abutting owners to clear sidewalk of snow and ice.**— The power is sustained by *Village of Carthage v. Frederick* (N. Y.), 3 Am. R. R. & Corp. Rep. 538. The decisions *pro* and *con* are cited in note to same case.

2. **Liability of owner for injuries resulting from his neglect.**— The conclusion of the foregoing case is the same in principle as that of *City of Rochester v. Campbell* (N. Y.), 3 Am. R. R. & Corp. Rep. 628, where it was held that an abutting owner, who was required by law to keep the sidewalk in repair in front of his property, was not liable over to the city for damages, which it had been compelled to pay to one who was injured by reason of the walk being out of repair.

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FORDYCE ET AL. V. WOLFE.

(Supreme Court of Texas, Nov. 13, 1891.)

1. **EMINENT DOMAIN. APPROPRIATION OF PROPERTY. WHEN TITLE VESTS.** Under the constitution of Texas the title to property attempted to be appropriated to public use, does not vest until the compensation has been paid or secured.

2. **RIGHTS OF GRANTOR AND GRANTEE WHEN CONVEYANCE MADE PENDING A WRONGFUL POSSESSION BY RAILROAD COMPANY.** A railroad company began proceedings to condemn a right of way over plaintiff's land. A few months

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\*Reported in 17 S. W. Rep'r, 637.

afterward plaintiff sold the land by an absolute deed. Subsequently the condemnation proceedings were dismissed. Plaintiff then brought suit for damages for the construction of the road across this land, plaintiff's vendee being made a party defendant. The company filed a plea asking for a condemnation of the land. Held, that plaintiff was entitled to compensation for the injury to the land resulting from the construction of the road and for the use of the land occupied by the company from the time of its entry to the date of the sale by plaintiff, and that plaintiff's vendee was entitled to recover for the value of the land taken, and for any such decrease in value of the remaining land as might have resulted from the acquisition by the company of a permanent right of way.

**A**PPPEAL from district court, Hunt county, Frank Templeton, special judge. Action by D. O. Wolfe against Fordyce and Swanson, receivers, and others. Judgment for plaintiff. Defendants appeal. Reversed.

*Perkins, Gilbert & Perkins* for appellants, the receivers. *R. D. Thompson* for appellant Measles. *R. L. Porter and Grubbs & Hefner* for appellee.

**GAINES, J.** This suit was brought by appellee to recover of appellants, Fordyce and Swanson, as receivers of St. Louis, Arkansas and Texas Railway Company, damages for the construction of a railway by the railroad company across a tract of land. He sought compensation for the land appropriated for the right of way, and also for damages to the remainder of the tract. The plaintiff was the owner of the land at the time the railroad was constructed, but had sold it to appellant Measles before the bringing of this suit. He made Measles a party defendant, alleging that when he sold and conveyed the land to the latter he reserved his claim for damages against the railroad company. The receivers prayed for a condemnation of the land for railroad purposes and asked that the damages should be assessed in the action. The defendant Measles pleaded, alleging his purchase of the land before the bringing of the suit, and prayed for a judgment in his favor for all the damages resulting both for the trespass and condemnation. The judgment of the court, however, was that the plaintiff should recover of the receivers, not only the damages to the tract for the construction of the road, but also compensation for the land condemned, and that defendant Measles should take nothing by reason of his plea in reconvention. Both the receivers

ers and Measles appeal from the judgment. The receivers complain only that the damages allowed are excessive; but, since the judgment will be reversed upon another ground, it is unnecessary, if not improper, to pass upon that question. Appellant Measles insists that the court erred in not rendering judgment in his favor for the damages, not only for the land taken, but also for the damages resulting to the remainder of the tract from the construction of the railroad. The facts bearing upon this question are that the railroad company constructed their road across the land in question some time in the spring or summer of 1887; and in June or July of that year instituted proceedings to condemn the right of way over it. In November of the same year, appellee sold and conveyed the entire tract to appellant Measles by a general warranty deed, which described it by metes and bounds, and which contained no exception or reservation whatever. In January, 1889, the condemnation proceedings were dismissed. In July, 1889, the present suit was brought. Section 17 of article 1 of our constitution provides, in effect, that no person's property shall be taken for a public use without adequate compensation being made; and it follows, therefore, that the title to property which is attempted to be appropriated for such purpose does not pass until the compensation has been paid or secured. If proceedings instituted against the appellee for the condemnation of the land had resulted in a final decree assessing the damages, and the damages had been paid, the appellant Measles, as a purchaser *pendente lite*, would, as to the railroad company at least, have been concluded thereby. But, this proceeding having been dismissed, we are of opinion that the rights of the parties to this suit were in no manner affected by it; and that this case is to be treated as if no such action had ever been instituted. At the time, therefore, when appellee conveyed the land to Measles, the railroad company was a mere trespasser, and appellee's title was unimpaired by its entry upon and use of its right of way. He had, however, right of action against it for such damages as resulted from its trespass. It is clear, we think, that by his warranty deed all his title to the land passed to Measles; and it is equally clear that his right of action to recover the damages for the mere trespass did not pass. For the latter he had a right of action, and it was not affected by his conveyance to his

vendee. The measure of his damages was the injury to the land which resulted from the mere construction of the railroad, and compensation for the use of so much of the land as was occupied by the company from the time of the entry until the date of his conveyance to Measles. In the case of *Railway Co. v. Ruby* (Tex. Sup.), 15 S. W. Rep'r, 1040, this court held that in a proceeding for the condemnation of land for a railroad the time of the "taking," within the meaning of the constitution, was the time of the trial. Having then acquired an absolute title to the entire tract of land, free from any easement or incumbrance by reason of the trespass of the railroad company, Measles, when the appellant receivers filed their plea in reconvention for the condemnation of its right of way, became entitled to recover all the damages incident to that proceeding. These do not embrace the injury which had resulted to the land from the construction of the railroad at the time it was conveyed to him, but do include the value of the land taken as well as any such deterioration in the value of the remainder of the tract as may have resulted from the fact that the railway company had acquired the right to permanently hold the right of way, and to use it for the purposes of operating a railroad. However, he is not entitled to recover for any damage done to the land before he bought it, and, therefore, his damages should be assessed with reference to the condition of the property at the time of his purchase. He is not entitled to recover for changes in the surface of the land, resulting from the construction of the road, but is entitled to recover for any depreciation in its value that may have resulted from the right acquired by the condemnation to permanently maintain the road across the tract. Appellee and appellant Measles are entitled to recover sums which, added together, will equal the amount the appellee would have been entitled to recover had he never conveyed, and no more; and care should be taken that the receivers be not subjected to a double recovery. There was error in adjudging that the appellee should recover the entire damages and that Measles should take nothing, and, therefore, the judgment is reversed, and the cause remanded.

**Eminent domain — right to damages as between grantor and grantee. —**  
**The right to compensation for land taken for public use, as between grantor**

\* Reported in 18 S. W. Rep'r, 145.

and grantee, in cases where a conveyance is made at some point between the first acts done toward the acquisition of the property and the final consummation of the taking, must, in the absence of agreements between the parties, depend upon whether the title to the property taken vested before or after the conveyance. In some states the property may be taken and title acquired before compensation is made. See *Lewis Em. Dom.*, §§ 454-456. The right to compensation is a personal claim, and after it has once accrued, does not pass by a deed of the land. *Tenbrook v. Jahke*, 77 Penn. St. 392. Where land is occupied wrongfully or by mere consent of the owner, expressed or implied, no right or title to the land so occupied passes, and a subsequent deed by the owner vests the entire estate in the grantee, and such grantee, in the absence of any reservation, is entitled to the just compensation for the land so occupied. *Donald v. St. Louis, etc., R. Co.*, 59 Iowa, 411; *Harrington v. St. Paul & Sioux City R. Co.*, 17 Minn. 215; *Hetfield v. Central R. Co.*, 29 N. J. Law, 571, reversing S. C., 29 N. J. Law, 306; *Galveston, etc., R. Co. v. Pfeuffer*, 56 Tex. 66. Compare with last case, *Central Ry. Co. v. Merkel*, 33 Tex. 723. Contrary decisions are *Pomeroy v. Chicago & Milwaukee Ry. Co.*, 35 Wis. 641; *Indiana, etc., Ry. Co. v. Allen*, 100 Ind. 409; *McLendon v. Railroad Co.*, 54 Ga. 293; *McFadden v. Johnson*, 72 Penn. St. 335; *Davis v. Titusville & Oil City Ry. Co.*, 114 Penn. St. 308. In *Rand v. Townshend*, 26 Vt. 670, the statute provided that any person interested in lands through which a highway is laid out might petition for damages. This was held to mean the owner at the time the highway was laid out. In *Lewis v. Wilmington, etc., R. Co.*, 11 Rich. Law, 91, the statute gave the right to apply to have compensation assessed to the owner at the time the railroad was finished, and the court held that a grantee of such owner could not apply. The Wisconsin case cited is virtually overruled by the case of *Sabine v. Johnson*, 35 Wis. 185; and the Pennsylvania case probably went on the theory that title passed to the railroad company upon its location upon and occupying the land which was before the conveyance in question.

The grantor in such case who has not consented to the occupation of his land may recover for all damages sustained up to the time of the deed, to be estimated as in an action of trespass. See cases above cited. These rules apply as well to flowage cases as to other forms of taking. If the owner of land flowed conveys, after the flowing and before the easement has been acquired, the right to compensation for the easement passes to the grantee. *Newell v. Smith*, 15 Wis. 101; *Sabine v. Johnson*, 35 Wis. 185, overruling *Mead v. Hein*, 23 Wis. 533; *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 493; *Sweeney v. United States*, 62 Wis. 396. But the right to recover such damages as have been sustained up to the time of the conveyance remain with the grantor. *Walker v. Oxford Woolen Manf. Co.*, 10 Met. 203; *Sabine v. Johnson*, 35 Wis. 185.

The right to recover for damages which are consequential in their nature is in the owner at the time the injury is done. *Illinois Central R. Co. v. Allen*, 39 Ill. 205; *Toledo, etc., Ry. Co. v. Morgan*, 72 Ill. 155; *Chicago & Alton R. Co. v. Maher*, 91 Ill. 812; *Chicago & Eastern Ill. R. Co. v. Loeb*, 118 Ill. 203; *Wabash, St. Louis & Pacific Ry. Co. v. McDougal*, 118 Ill. 229; *Chicago & Eastern Illinois R. Co. v. Loeb*, 8 Ill. App. 627; *Zimmerman v. Union Canal Co.*, 1 W. & S. 246; *Hellman v. Union Canal Co.*, 50 Penn. St. 293. So under

statutes giving damages for a change of grade in a street, *Sargent v. Machias*, 65 Me. 591; *Dixon v. Baltimore, etc., R. Co.*, 1 Mackey (D. C.), 78; or by reason of the discontinuance of a highway. *King v. New York*, 103 N. Y. 171.

It is held that the person condemning is not affected by an unrecorded deed of which he has no notice, and that good title is acquired by making the owner of record a party. *Cool v. Crommet*, 18 Me. 250. And where the grantee in an unrecorded deed is present and makes no claim for damages, he cannot afterward intervene for the purpose of quashing the proceedings. *Brown v. County Comrs.*, 12 Met. 208. Where the conveyance reserves a water power, the right to recover for injury to that remains with the grantor. *Galena, etc., R. Co. v. Haslam*, 78 Ill. 494. The city of Worcester had taken certain waters and lands and constructed valuable works and improvements for the purpose of supplying the city with water, but doubt existed as to the city's title. In 1871 an act was passed that the city should, within sixty days from the time the council should vote to take any lands, ponds or streams of water, file in the office of the registry of deeds an instrument describing the lands, etc., taken, and stating the purposes for which the same were taken, and that title thereto should vest in the city from the time of filing such instrument. The act also provided that any land-owner injured by the taking might petition for damages. It was held that under this act a corporation which acquired land in 1870 could recover for injuries thereto occasioned by a former taking in 1864 — that the city must take the act with its burdens. *Crompton Carpet Co. v. Worcester*, 128 Mass. 498. A deed reserved to the grantor "all the damages sustained in consequence of the railroad crossing the lands conveyed." At the time the deed was made a railroad was in possession of a strip across the land, but had no title. Afterward the company paid the grantee and took a deed from him. The grantor sued the grantee for the money so received. It was held that he could not recover, and that the only effect of the provision in the deed was to reserve the damages which had already accrued. *Dennison v. Taylor*, 15 Abb. N. C. 439.

## McDOWALL V. SHEEHAN.

(Court of Appeals of New York, Dec. 1, 1891.)

1. CORPORATIONS. STATUTE MAKING STOCKHOLDERS LIABLE TO CREDITORS UNTIL CAPITAL PAID IN AND CERTIFICATE FILED IS NOT FOR BENEFIT OF DIRECTORS. Under Laws New York 1848, chapter 40, section 10 (general manufacturing act), which provides that all stockholders of the corporations named in the act shall be liable to creditors thereof until the entire capital stock shall have been paid in and certificate thereof filed, the word "creditors" does not include directors to whom the corporation is indebted for salaries.

2. QUALIFICATIONS OF DIRECTOR OR TRUSTEE. One may lawfully act as trustee of a corporation in New York though not a stockholder therein.

**A** PPEAL from supreme court, general term, third department.  
Action by John McDowall against Cornelius Sheehan to

charge the latter with personal liability as a stockholder of the Saratoga Union, a newspaper corporation. Plaintiff obtained judgment, which was affirmed by the general term. Defendant appeals. Reversed.

*J. W. Crane* for appellant. *Chas. S. Lester* for respondent.

EARL, J. In May, 1887, a corporation called the "Saratoga Union" was organized under the general manufacturing act of 1848, and the acts amending the same, for the purpose of publishing a newspaper in Saratoga Springs. The certificate of incorporation was signed and acknowledged by Benjamin F. Judson, Edmund J. Huling, John W. Howe, R. F. Knapp and the plaintiff, who thus became the incorporators, and they were named in the certificate as the trustees for the first year. On the 10th day of June thereafter, at the first meeting of the incorporators, Huling was chosen president of the corporation, the plaintiff vice-president, and Judson treasurer and general manager, neither of such persons at the time being stockholders or subscribers for stock. Prior to the incorporation, the plaintiff and Judson, who were relatives, were engaged in business together. They were the chief promoters of the incorporation, and one of the purposes for forming the corporation was to give them employment. Immediately after the corporation was launched, the plaintiff was employed as the editor of the newspaper, and he assisted in carrying on and managing the same, and his compensation, fixed by Judson and himself, was \$20 per week. The business of the corporation was carried on until October, 1888, when it became insolvent, and it thereafter ceased to do any business. During all that time — seventy-three weeks — the plaintiff continued in the employment of the corporation, and received, to apply upon his stipulated compensation, only \$20, the payment for one week's service. During that time he continued vice-president and a director of the corporation, and he attended all the meetings of the directors, and was active in the management of the corporation. In July, 1887, he was present at a meeting of the directors at which it was resolved to mortgage all the property of the corporation to secure a person for indorsing a note for it. In February, 1888, he was present at a meeting of the directors, at which it was resolved that the corporation should execute to Mrs. Judson



a mortgage covering "the franchises, property, rights, liberties, presses, engine and boiler, folder, type, type-cases, furniture and all property owned by the corporation, except paper and ink," to secure her for \$7,000. At the same meeting it was resolved that the secretary be authorized and directed to execute to Mrs. Judson an assignment or conveyance of the Associated Press franchise owned by the corporation as additional security for the same sum. In July, 1888, at another meeting of the directors, at which plaintiff was present, it was resolved that the corporation hire from Mrs. Judson the presses, material and type comprising its job-office department, at the rate of \$100 a year. The capital stock of the corporation specified in the certificate filed was \$10,000, divided into shares of \$100 each. The capital was never all subscribed for or paid in, and no certificate was made, as required by sections 10 and 11 of the act of 1848. The plaintiff brought an action against the corporation to recover the amount due him as a creditor thereof, and he recovered judgment, and issued execution thereon, which was returned wholly unsatisfied. He then commenced this action to enforce the liability of the defendant as a stockholder under section 10 of the act, which provides that all the stockholders of such corporation shall be severally individually liable to the creditors thereof to an amount equal to the amount of stock held by them respectively for all debts and contracts made by the corporation, "until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded, as prescribed in the following section."

The defendant's relation to the company grows out of the following facts: Before the corporation was formed he was solicited to take stock therein, and he promised to aid the enterprise. In May, 1887, before the certificate of incorporation was filed, he went to Judge Putnam, and made his check, payable to his order, for the sum of \$1,000, stating to him that he designed it as a gift to help the enterprise, and directing him not to pay the amount to the corporation until he, the defendant, would not incur any further liability. The defendant did not part with the check with any other or different intention than that expressed in his directions to Putnam, and Putnam intended to aid the enterprise in a similar manner by advancing the sum of \$500 on

the same or similar terms. Previous to the 7th day of July, 1887, Judson, the director above named, went to Putnam, and stated and represented to him that eighty-five shares of the capital stock had been subscribed or paid for, whereas there had not then been any of it subscribed or paid for. Putnam believed the statement to be true, and communicated it to the defendant, and thereafter, on the 7th day of July, he made his check, with the assent of the defendant, to the order of the plaintiff, for the sum of \$1,500, which check included the check left with him by the defendant as above stated. Putnam then received two certificates of stock which had on that day been made out to the plaintiff — one for \$1,000 and the other for \$500 — each of which contained on the back thereof a blank assignment signed by the plaintiff. Putnam would not have parted with the check if he had not believed the statements made to him by Judson to have been true. The defendant did not learn of the falsity of the statements upon which the check was procured until after the commencement of this action. The plaintiff voted on the stock the same after as before the blank assignment thereof, and continued to act as such stockholder so long as the corporation existed; and the certificate of stock continued in his name on the stock-book of the corporation the same after as before the assignment, and the defendant's name never was entered on the book in any manner. It does not appear that the plaintiff personally had the benefit of the \$1,500 paid by Putnam, and he never held the certificates of stock made out to him, except to sign his name to the blank assignment on the back thereof, and he never had any other stock in the corporation. After the certificate for the ten shares was delivered to Putnam, he sent or delivered it to the defendant, by whom it was laid away. The defendant never attended any meeting of the stockholders, and never acted as a stockholder, and never received any notice of a meeting of the stockholders.

It is apparent from these facts that the plaintiff's recovery against the defendant is very inequitable, and we believe the law will not uphold it. While the language of section 10 of the act of 1848 is broad and general that all stockholders of such a corporation shall be liable to creditors thereof to the amount of the stock held by them respectively for all debts and contracts made by the corporation, until the whole amount of its capital

stock shall have been paid in, and the proper certificate shall have been made and recorded, who are meant by "the creditors of the company?" That is the question now to be answered. It is provided in section 2, article 8, of our state constitution, that "dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law." Can it be supposed that the framers of the constitution in drafting this section had in mind "dues" to the directors of corporations, and that the directors were objects of their solicitude, whose protection should be guaranteed by the fundamental law? In 1846 private corporations for all kinds of ends were rapidly increasing in this state, and the statesmen of that day thought it wise and sound public policy that the creditors of such corporations should in some cases and to some extent have, besides the corporate responsibility, some security in the individual liability of the corporators. But that public policy plainly had reference to outside creditors of a corporation, dealing with and trusting it, and generally ignorant of its precise financial condition. It could have no relation to the creditors of a corporation, who manage its affairs, and can generally know its condition, who create the debts, and can generally protect themselves, if creditors, before disaster overtakes them. The constitutional provision, and the laws enacted to give effect to the policy embodied therein, were not intended for the protection of the debt makers, directors who constitute themselves creditors of the corporation, and then attempt to unload their burden upon stockholders whose interests were committed to their hands. We think by the fair construction of the language used in section 10 the debt makers are excluded from its scope, as well as from the policy which it was intended to promote. Suppose the whole capital stock of this corporation had been paid in, but the certificate had not been made and recorded, the plaintiff would still have been a creditor; but would it be contended that he would still be entitled to the protection intended by the section to be secured to the creditors of the corporation? If not, why would he not? We answer, simply because the word "creditors," as there used, does not include a creditor thus situated. Even if such a creditor can be fairly said to be within the general language used, he is clearly without the policy of the law, and so, plainly, not within the intention of the

law-makers that the law should be held not to cover his case ; and for this view of the statute the case of *Riggs v. Palmer*, 115 N. Y. 506 ; 22 N. E. Rep'r, 188, is ample authority. The statute should not be so construed that the directors of a moribund corporation could constitute themselves creditors for salaries or wages, and thus impose liabilities upon confiding and innocent stockholders. The plaintiff, having been named as a trustee in the certificate of incorporation, could legally act as trustee, although he did not in fact own any stock. *Davidson v. Gas-Light Co.*, 99 N. Y. 558 ; 2 N. E. Rep'r, 892. But, in any event, having acted as a director, and enjoyed all the privileges and advantages of that position, and wielded its powers for the purpose now in hand, he must be held a director. We have assumed, as we ought upon the findings of the trial term, that the defendant, under all the circumstances, holding the certificate of stock, became the legal and equitable owner thereof, and that thus he would have been liable to what we have termed the outside creditors of the corporation. *Johnson v. Underhill*, 52 N. Y. 203. Our conclusion, therefore, is that the plaintiff must be defeated in his action solely because he was a director of the corporation, and thus not entitled to the protection which the law intends to secure to the creditors of such a corporation ; and as this ground of defense is fundamental, and cannot be obviated by any proof which it seems possible for him to furnish, we can perceive no purpose to be served by a new trial. The judgment should, therefore, be reversed, and the complaint dismissed, with costs.\*

Finch, Peckham and Gray, JJ., concur. Ruger, Ch. J., and Andrews and O'Brien, JJ., not voting.

1. *Stockholders*—statute making them liable to creditors until capital paid in and certificate filed.—The character of such statutes, as penal or otherwise, is considered in *Cochran v. Welchers*, 2 Am. R. R. & Corp. Rep. 377, and note, p. 382.

2. *Qualifications of directors*.—A director need not be a stockholder in the absence of any statutory provision to the contrary. 1 Am. R. R. & Corp. Rep. 145, note. So as to a non-resident or alien. *Commonwealth, ex rel., v. Detwiler*, 1 Am. R. R. & Corp. Rep. 137 ; *Robinson v. Hemingway*, 1 Am. R. R. & Corp. Rep. 143.

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\* Reported in 29 N. E. Rep'r, 299; 129 N. Y. 200.

## SCHAFFNER ET AL. V. EHRLMAN ET AL.

(Supreme Court of Illinois, Oct. 31, 1891.)

1. **BANKS AND BANKING. REFUSAL OF BANK TO PAY CHECK CAUSED BY MISTAKE. LIABILITY FOR DAMAGES.** A banker who refuses to cash a check drawn by a depositor engaged in trade, who has sufficient funds on deposit to meet the check, is liable therefor in substantial damages, even though the refusal was caused by mistake, and there is no evidence of special damage or of actual malice.

2. **AMOUNT OF DAMAGES. WHETHER EXCESSIVE.** Where the banker has refused to pay four checks for the aggregate sum of \$900, a verdict for \$450 damages is not excessive.

**A** PPEAL from appellate court, first district. Action on the case by Herman E. Ehrman and Max Ehrman, copartners as Ehrman Bros., against Herman Schaffner and Abraham G. Becker, copartners in the banking business as Herman Schaffner & Co., for refusing to pay four checks for the aggregate amount of \$900, drawn on them by the plaintiffs. Plaintiffs obtained judgment for \$450, which judgment was affirmed by the appellate court. Defendants appeal. Affirmed.

*Jacob Newman* for appellants. *Blum & Blum* for appellees.

**WILKIN, J.** Appellants were bankers in the city of Chicago. From 1886 to May 31, 1888, appellees, in the course of their business as wholesale and retail liquor dealers in said city, deposited money in appellants' bank, and from time to time drew checks against the same. On the 4th day of said May the book-keeper of the bank, by mistake, charged two checks, amounting to \$125, drawn by Ehman & Co., to appellees, whose accounts on the bank's books stood next above that of said Ehman & Co. By this mistake appellees' deposit was shown by said books to be \$125 less than it in fact was. On the 28th of that month appellees drew their check on the bank for \$249, payable to the order of the firm of Schufeldt & Co., which was duly presented on the same day through the clearing-house at Chicago and payment refused for want of funds, and so returned through said clearing-house. The next day the holders, Schufeldt & Co., telegraphed appellees of the refusal of the bank to pay. This led to a careful examination of the account, and upon comparing appellees' pass or deposit-book with

the books of the bank the above-mentioned mistake was discovered. Thereupon the bank immediately wrote a letter to Schufeldt & Co., explaining how the error occurred, and that the check should have been paid, appellees having sufficient funds in the bank at the time it was presented for full payment. Appellees closed their account with the bank, and all their checks were returned; whereupon they discovered that payment of two other checks drawn by them during that month had also been refused for want of funds, but, upon being presented a second time, were paid, they having between the first and second presentations of said checks made deposits sufficient to pay them. This action was brought by appellees against the appellants to recover damages alleged to have been sustained by the refusal to pay these several checks. The case was tried in the circuit court of Cook county, without a jury, and judgment rendered for plaintiffs for \$450 and costs of suit, which judgment has been affirmed by the appellate court.

Appellants requested the circuit court to hold, as a proposition of law applicable to the case, that, to entitle plaintiffs to recover more than nominal damages, they must prove that they had sustained actual or substantial damages, or that the defendants acted from malicious motives in refusing payment of the checks in question, and that the law will not, without proof of special damages, presume that by the dishonoring of the checks plaintiffs sustained special or substantial damages; but the request was denied. The case turns upon the correctness of this ruling. The refusal to pay these checks was the result of a mere error in book-keeping, and not made from any express motive to injure appellees. It was shown on the trial, by other bankers, that such mistakes are liable to occur in any bank, and cannot be wholly avoided. One of appellees testified on this trial that he had written a letter to the payee of one of said last-named checks, residing and doing business in Philadelphia, requesting him to have his agent call upon their firm, which agent had previously called on them to solicit orders, as they wished to purchase goods; but he never received any reply to the letter, never saw the agent, heard nothing either from the agent or from the house or any other person concerning said check or said letter. He also testified that the check drawn in favor of said Philadelphia house had been protested for non-payment when payment was refused on first

presentation. This was the only evidence from which it could be inferred that actual loss or injury resulted from the non-payment of either of said checks; and it would not be sufficient to sustain a judgment for more than nominal damages, if substantial damages can only be allowed in such cases upon proof of actual damages or loss. The question, therefore, is, what is the measure of a banker's liability to a person engaged in trade for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice or special injury to the depositor? Authorities are not numerous on the question, but they seem to be uniformly to the effect that more than mere nominal damages are in such cases recoverable. The leading case is that of *Rolin v. Steward*, 14 C. B. 595. In that case there was no evidence of malice in fact, or of special damages; but the jury were told that they ought not to confine their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks. And the jury accordingly, by their verdict, gave substantial damages, on which judgment was rendered by the trial court. On appeal all the judges concurred in holding that the direction to the jury was correct, the case being likened to that of a slander of a person in the way of his trade. Williams, J., said: "I think it cannot be denied that, if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer's in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages; and, when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as in the case of an action for slander of a person in the way of his trade the action lies without proof of special damages." This case was cited with approval in *Prehn v. Bank*, 5 L. R. Exch. 92, in which Martin, B., says: "Now, with respect to damages in general, they are of three kinds: First, nominal. The second kind is general damages, and their nature is clearly stated by Cresswell in *Rolin v. Steward*, 14 C. B., to be



as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man." In Wood's *Mayne on Damages* (2d Amer. ed.), page 12, section 8, the rule is announced that when there may be an injury existing at present, though unsustainable, or to arise hereafter, and for which no further action could be brought, substantial damages might be given at once," in the case of *Rolin v. Steward*, supra. And text-writers, without exception, seem to approve of the rule announced in that case. See Bish. Non-Cont. Law, § 49; 1 Suth. Dam., p. 129; 3 Amer. & Eng. Enc. Law, p. 226, where it is said: "The depositor, by proving special loss, may recover special damages from the bank for its breach of duty; but, if unable to do so, he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained," citing authorities. Where a bank refuses to honor a check of its depositor without legal cause, the latter is entitled to recover substantial damages. *Paterson v. Bank*, 130 Penn. St. 419; 18 Atl. Rep'r, 632. In the Pennsylvania case the point is directly decided. The ground upon which substantial damages are there held recoverable is that of public policy. We have also examined the text-books on the subject of banks and banking within our reach, and find that they uniformly, so far as they treat of the subject, approve of the rule announced in *Rolin v. Steward*, supra.

We are of the opinion that the conclusion in that case was reached by proper reasoning. It is well understood that in an action of slander by a person for the speaking of slanderous words of him in the way of his trade the fact that he is a trader takes the place of special damages. To return a check marked "Returned for want of funds" to the holder, especially through a clearing-house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business; and it needs no argument to show that a single refusal of that kind might often, and frequently does, bring ruin upon a business man; yet it is no more possible in either case to prove special or actual damages than it is for one charged with the commission of a crime to show specifically in what manner he has been injured. It is said, however, that in an action of slander the recovery is not because of slanderous words spoken maliciously, and here it



is said there was no malice whatever. While it is true that in slander malice is the gist of the action, yet the term "malice" is always used in such cases in a legal sense. As was said by Bayley, J., in *Bromage v. Prosser*, 4 Barn. & C. 247, which was an action for slander of a bank, the words being, in substance, that it had stopped payment, "'malice,' in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I mean to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?" So here the bank wrongfully refused to pay the checks of the appellee. That refusal was intentional, and without just excuse. There were, therefore, all the elements of legal malice, although there might have been no intention to injure the appellee. See *Starkie Sland. & Lib.*, p. 191; *Com. v. Bonner*, 9 Mete. (Mass.) 412. We cannot say that the damages allowed in this case were excessive, under all the circumstances proven. The judgment of the appellate court will be affirmed.

CRAIG, J. (dissenting). I do not concur with a majority of the court in the decision of this case. The action in form is in tort, but upon a moment's reflection it will be apparent that the action is founded upon a contract. The banker receives the funds of his customer on deposit, and agrees with the customer to pay checks drawn by him on the bank so long as the customer has money to his credit in the bank. This is the contract existing between the banker and the depositor when an account is opened in a bank, and, whenever the bank violates that contract by refusing to pay a check on the bank where the depositor or drawer of the check has sufficient money on deposit to pay the check, the contract is broken, and an action will lie on that contract to recover such damages as the depositor has sustained. In the case under consideration the bank refused to pay the check of the plaintiff, although it had in its hands money belonging to him in amount sufficient to pay the check; and, while the action is in

form case, it is predicated upon the contract, and, being founded on the contract, plaintiff is entitled to recover such damages as the evidence shows he has sustained, and no more. But although he may not have proven any actual damages, yet he will be enabled to recover nominal damages. This is the rule established in the well-considered case of *Marzetti v. Williams*, 1 Barn. & Adol. 415. Here the proof fails to show any actual damage, and there is no evidence tending to prove malice, fraud or oppression on the part of the bank; and in such a case, in my opinion, no recovery could be had for more than nominal damages.\*

**Banks and banking—refusal of bank to honor check—damages.**—In the case of *Patterson v. Marine National Bank*, 180 Penn. St. 419, 433, the court says: "A bank is an institution of a quasi public character. It is chartered by the government for the purpose, *inter alia*, of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositors' checks upon demand. Individual and corporate business could hardly exist for a day without banking facilities. At the same time, the business of the community would be at the mercy of banks if they could at their pleasure refuse to honor their depositors' checks, and then claim that such action was a mere breach of an ordinary contract for which only nominal damages could be recovered, unless special damages were proved. There is something more than a breach of contract in such cases; there is a question of public policy involved, as was said in *First National Bank v. Mason*, 95 Penn. St. 113; and a breach of the implied contract between the bank and its depositors entitles the latter to recover substantial damages." A judgment for \$300 was sustained though there was no proof of special damage.

## CITY OF CRAWFORDSVILLE V. BRADEN.

(Supreme Court of Indiana, Oct. 27, 1891.)

1. **MUNICIPAL CORPORATIONS. POWER TO ERECT AND MAINTAIN ELECTRIC LIGHT PLANT FOR PUBLIC AND PRIVATE LIGHTING.** Municipal corporations have inherent power, independent of powers expressly granted, to furnish light for their streets, alleys and public places, and having power to erect and maintain a plant for this purpose it may, at the same time, supply light for private consumption.

2. The furnishing of electric light for private use may also be justified as a legitimate exercise of the police power for the preservation of property and health, as the same does not vitiate the air and is not liable to set fires.

3. A municipal corporation having no express power on the subject except to light the streets, alleys and other public places, held authorized by virtue

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\* Reported in 23 N. E. Rep'r, 917.

of this and its inherent powers, to construct and maintain an electric light plant for lighting the streets, alleys and public places and furnishing light to private houses and places of business.

4. MODE OF EXERCISING POWERS. RESOLUTION OR ORDINANCE. Where a city council has power to act in a given case, and the mode of action is not prescribed by charter, it may proceed either by resolution or by ordinance.

**A**PPEAL from circuit court, Montgomery county, E. C. Snyder, judge. Bill by Hector S. Braden to enjoin the city of Crawfordsville from supplying private citizens with electric light. From a decree overruling defendant's demurrer, and allowing a perpetual injunction, defendant appeals. Reversed.

*W. T. Brush*, city attorney, *Davidson & West* and *Kennedy & Kennedy* for appellant. *Crane & Anderson* for appellee.

**McBRIDE, J.** The question we are required to decide in this case is, has a municipal corporation in this state the power to erect, maintain and operate the necessary buildings, machinery and appliances to light its streets, alleys and other public places with the electric light, and at the same time, and in connection therewith, to supply electricity to its inhabitants for the lighting of their residences and places of business. Some other questions are incidentally involved, but the principal controversy is as above stated. That a city or an incorporated town may buy and operate the necessary plant and machinery to light its streets, alleys and other public places is not controverted by the appellee; but he denies the right to furnish the light to the individual for his private use. The question is argued on the theory that, if the city has such power, it must be by virtue of some express legislative grant, and is not among the implied powers possessed by municipal corporations; that statutes conferring powers upon municipal corporations, especially those involving the exercise of the taxing power, must be strictly construed; and that, strictly construed, no statute confers the necessary authority. The purchase of the necessary land, machinery and material, and the erection and maintenance of such a plant, does involve the exercise of the taxing power. The necessary funds must be supplied by taxing the tax-payers of the municipality. The only statute bearing directly upon this question is the act of March 3, 1883. Elliott, Supp., § 794 et seq. Section 794 contains the following: "That

the common council of any city in this state, incorporated either under the general act for the incorporation of cities, or under a special charter, and the board of trustees of all incorporated towns in this state, shall have the power to light the streets, alleys and other public places of such city and town with the electric light and other form of light, and to contract with any individual or corporation for lighting such streets, alleys and other public places with the electric light or other forms of light, on such terms, and for such times, not exceeding ten years, as may be agreed upon." Section 795 provides that, for the purpose of effecting such lighting, the common council of a city or board of trustees of a town may provide, by resolution or ordinance, for the erection and maintenance in the streets, etc., of the necessary poles and appliances. Section 796 authorizes granting to any person or corporation the right to erect and maintain in the streets, etc., the necessary poles and appliances for the purpose of supplying the electric or other light to the inhabitants of the corporation. Section 797 validates contracts of a certain character, made before the enactment of the statute; and section 798 provides for the appropriation of lands and right of way by corporations engaged in the business of lighting cities or towns, "or the public and private places of their inhabitants, with the electric light," etc. It will be observed that, while section 796 provides for granting to third persons the right to furnish the light to the inhabitants, it does not, in terms, give any such power to the corporation. It will, therefore, be necessary for us to inquire if the corporation possesses such power independently of the statute, or, if not, if the statute is susceptible of a fair construction, in accordance with established rules, which clothes the corporation with such power. In the case of *Gas Co. v. City of Rushville*, 121 Ind. 206; 23 N. E. Rep'r, 72, this statute was considered, in so far as relates to the right of the city to buy and operate the necessary plant and machinery to light its streets, alleys and other public places, and it was held that the statute was sufficient to confer that power. In that case the court, after announcing the conclusion above stated, used the following language:

"If there were any doubt as to the meaning of the act, it would be removed by considering it, as it is our duty to do, in connection with the general act for the incorporation of cities; for that

act confers very comprehensive powers upon municipal corporations as respects streets and public works, and contains many broad general clauses akin to those which Judge Dillon designates as 'general welfare' clauses. Our own decisions fully recognize the doctrine that municipal corporations do possess, under the general act, authority as broad as that here exercised, and the operation of that act is certainly not limited or restricted by the act of 1883." The eminent author above referred to thus defines the powers of municipal corporations: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, nor make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." Dill. Mun. Corp. (4th ed.), § 89. Judge Dillon, however, quotes approvingly from the supreme court of Connecticut as follows (§ 90, p. 147): "All corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant cannot be found in the language of their charters, we should deny them in some cases the power of self-preservation, as well as many of the means necessary to effect the essential objects of their incorporation. And, therefore, it has long been an established principle in the law of corporations that they may exercise all the powers, within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this, they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation." *Bridgeport v. Railroad Co.*, 15 Conn. 475-501. This principle has been repeat-

edly recognized by this court. Thus in *Smith v. City of Madison*, 7 Ind. 86, it is said: "The strictness, then, to be observed in giving construction to municipal charters, should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied, in order to the complete exercise of the powers granted." Again, in *Kyle v. Malin*, 8 Ind. 34-37, the court said: "The action of municipal corporations is to be held strictly within the limits prescribed by the statute. Within these limits they are to be favored by the courts. Powers expressly granted or necessarily implied are not to be defeated or impaired by a stringent construction."

Among the implied powers possessed by municipal corporations in this state are those grouped under the somewhat comprehensive title of "police powers" — a power which it is difficult either to precisely define or limit; a power which authorizes the municipality in certain cases to place restrictions upon the power of the individual, both in respect to his personal conduct and his property, and also furnishes the only authority for doing many things not restrictive in their character, the tendency of which is to promote the comfort, health, convenience, good order and general welfare of the inhabitants. The police power primarily inheres in the state; but the legislature may, and in common practice does, delegate a large measure of it to municipal corporations. The power thus delegated may be conferred in express terms, or it may be inferred from the mere fact of the creation of the corporation. The so-called inferred or inherent police powers of such corporations are as much delegated powers as are those conferred in express terms, the inference of their delegation growing out of the fact of the creation of the corporation, and the additional fact that the corporation can only fully accomplish the objects of its creation by exercising such powers. Special charters, as well as general statutes for the incorporation of cities and towns, usually contain a specific enumeration of powers granted to, and which may be exercised by, such corporations. In many cases the powers thus enumerated are such as would be implied by the mere fact of the incorporation. Where powers are thus enumerated in a statute which would belong to the corporation without specific enumeration, the specific statute is to be regarded, not as the source of the power, but as merely declaratory of a pre-existing power, or,

rather, of a power which is inherent in the very nature of a municipal corporation, and which is essential to enable it to accomplish the end for which it is created. And the enumeration of powers including a portion of those usually implied, does not necessarily operate as a limitation of corporate powers, excluding those not enumerated. *Clark v. City of South Bend*, 85 Ind. 276; *Bank v. Sarlls* (Ind. Sup.), 28 N. E. Rep'r, 434.

The corporation, notwithstanding such enumeration, still possesses all of the usually implied powers, unless the intent to exclude them is apparent either from express declaration, or by reason of inconsistency between the specific powers conferred and those which would otherwise be implied. The legislature can unquestionably take from municipal corporations powers which would inferentially be conferred upon them by their creation, or it can restrict the exercise of such powers, or in any manner control their exercise, the legislative will being as to such matters supreme. Among the implied powers possessed by municipal corporations is the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life and property. Thus, in this state, it has been held that, independently of any statutory authority, such corporations possess the inherent power to enact ordinances for the protection of the property of its citizens against fire. *Baumgartner v. Hasty*, 100 Ind. 575; *Bank v. Sarlla*, *supra*; *Hasty v. City of Huntington*, 105 Ind. 540; 5 N. E. Rep'r, 559; *Clark v. City of South Bend*, 85 Ind. 276; *Corporation of Bluffton v. Studabaker*, 106 Ind. 129; 6 N. E. Rep'r, 1. This power will not only authorize the enactment and enforcement of ordinances establishing fire limits, regulating buildings and repairing buildings, and regulating the storage and traffic in inflammable or explosive substances, but the purchase of apparatus for extinguishing fires and furnishing a supply of water. *Corporation of Bluffton v. Studabaker*, *supra*. In the case of *City of St. Paul v. Laidler*, 2 Minn. 190 (Gil. 159), the supreme court of Minnesota, after holding that a municipal corporation is "a creature of the law, and in the exercise of its authority cannot exceed the limits therein prescribed, says: "It is a body of special and limited jurisdiction; its powers cannot be extended by intendment or implication, but must be confined within the express grant of the legislature;" and then says further: "Incidental to the ordinary

powers of a municipal corporation, and necessary to the proper exercise of its functions, is the power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporate limits." If this statement is correct, it follows that to concede to municipal corporations the possession of such powers does not involve any extension, either by intendment or implication, of the powers expressly conferred by statute; but that, by the act authorizing the organization of the corporation, the legislature expressly delegates to the municipality, the power to take such steps as are necessary to preserve the health and safety (and we will add the property) of its inhabitants. The inference of the delegation of such powers follows inevitably and irresistibly, because their exercise is necessary to the accomplishment of the objects of the corporation. When a municipal corporation attempts to exercise any of the powers thus implied, or inferentially conferred, it is within the rule of *Kyle v. Malin*, *supra*, as fully as it is when attempting to exercise those powers the warrant for which is found in the express letter of its organic law. It is to be favored by the courts, and such powers are not to be defeated or impaired by a stringent construction. It is, of course, important and necessary to know in each case that the power claimed is in fact included in the implied powers of the corporation.

There can be little or no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers, as being necessary to properly protect the lives and property of its inhabitants, and as a check on immorality. This is forcibly set forth by Judge Dillon in his work on *Municipal Corporations*, as follows: "In a most important particular, however, Rome suffers by comparison with modern cities. Its public places were not lighted. All business closed with the daylight. The streets at night were dangerous. Property was insecure. No attempt at public illumination was made. The idea does not seem to have occurred to them. Persons who ventured abroad on dark nights were dimly lighted by lanterns and torches. \* \* \* No more forcible illustration of the necessity and advantages of lighting a city can be given than the pictures drawn by Lanciani and Macaulay of the state of a great city buried in the darkness of night; and they show how clearly the power to provide for this



is essentially and peculiarly one pertaining to municipal rule and regulation. Nor are these studies, and the facts that they reveal, without practical value to the jurist. They demonstrate that a large and dense collection of human beings, occupying a limited area, have needs peculiar to themselves, which create the necessity for municipal or local government and regulation, and this, in its turn, the necessity for corporate organizations. The body thus organized, as it has duties, so it acquires rights peculiar to itself, as distinguished from the nation or state at large." Dill. Mun. Corp. (4th ed.), § 3a. While Judge Dillon's remarks have, of course, special reference to great cities, the difference in that respect between the greater and the minor municipal corporations is a difference in degree, and not in kind. Wherever men herd together, in villages, towns or cities, will be found more or less of the lawless or vicious, and crime and vice are plants which flourish best in the darkness. So far as lighting the streets, alleys and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of lighting which is best suited to the wants and the financial condition of the corporation. It is well settled that the discretion of municipal corporations, within the sphere of their own powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused to the oppression of the citizen. *Valparaiso v. Gardner*, 97 Ind. 1; 15 Amer. & Eng. Enc. Law, 1046, and authorities there cited. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally the further power to procure or furnish whatever is necessary for the production and dissemination of the light. The only authority cited which holds a contrary doctrine is that of *Spaulding v. Inhabitants (Mass.)*, 26 N. E. Rep'r, 421. We are, however, unable to recognize the validity of the reasoning in that case. We are unable to see the analogy between the city of Boston, because authorized to light its streets, engaging in whale fishery to procure oil for that

purpose, or the other supposed cases, and the generation and supply of electricity. Electricity is not a commodity which can be bought in the markets, and transported from place to place like oil. We take judicial notice of the laws of nature and of nature's powers and forces, and, therefore, take judicial notice of that which is known as "electricity," and of its properties; not, of course, of the various methods of generating and transmitting or using it, but of the thing itself, and of its nature. As in many other cases, here the judicial presumption outruns the fact, and we are supposed to know and to take judicial notice of more than we can in fact know in the present state of scientific knowledge. We must know, however, that it cannot be generated and transported from place to place as we can procure and transport oil, clothing, etc., and that it can only be conveyed from the place where it is generated to where it is needed for lighting the streets, or to the numerous inhabitants of a city, so as to enable them to use it as a general illuminant, by invoking and exercising the power of eminent domain.

The corporation possessing, as it does, the power to generate and distribute throughout its limits electricity for the lighting of its streets and other public places, we can see no good reason why it may not also at the same time furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here, again, is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire, or to consume the oxygen in the surrounding air, and thus render it less capable of sustaining life and preserving health. But little authority has been cited bearing on the precise question, and we have been able to find but little. The case of *Mauldin v. City Council* (S. C.), 11 S. E. Rep'r, 434, has been cited by the appellee. That was, like this, a suit by tax-payers of the city of Greenville to restrain the city council from purchasing and operating an electric light plant to light the streets and public build-

ings of the city, and from using it for lighting private residences. In that case the court says: "The city has the express power to own property, and the implied power to light the city. \* \* \* Considering that some discretion as to the mode and manner should be allowed the municipality in carrying out the conceded power to light the streets of the city, we hold that the purchase of the plant was not *ultra vires* and void, so far as it was designed to produce electricity suitable for and used in lighting the streets and public buildings of the city." The court, however, denied the right to furnish the light to the individual citizen on the ground that to do so would be entering into private business outside of the scope of the city government. The court refers to the lack of authority on the precise question, and that it is largely a question of first impression, without authority. The case of *Electric Co. v. City of Newton*, 42 Fed. Rep'r, 723, was a suit to enjoin the city of Newton from purchasing and operating an electric light plant, and furnishing the light to the inhabitants. The only statutory authority claimed by the city is as follows: "To establish and maintain gas-works or electric light plants, with all the necessary poles, wires, burners and other requisites of said gas-works or electric light plants." Acts 22d Gen. Assem. Iowa, p. 16. It will be observed that this statute does not in terms confer any power not, in our opinion, as above stated, included among the implied powers of municipal corporations. The court says: "It is also urged that the city has only the authority to erect an electric plant for the purpose of lighting the streets and public places of the city, and is not authorized to furnish light for use in the houses and stores of its citizens. \* \* \* It has been the uniform rule that a city, in erecting gas-works or water-works, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category." The case of *Smith v. Mayor*, etc., 88 Tenn. 464; 12 S. W. Rep'r, 924, is also in point as to the principle involved. The charter of the city of Nashville contained the following in its enumeration of the powers conferred upon the city: "To provide the city with water by water-works, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and organize and establish

fire companies." Acting under the authority thus conferred, the city established water-works, and, in addition to making provision for the extinguishment of fires, it furnished water to the citizens. The right to do this was disputed, and formed the principal subject of controversy. The court said: "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all can be furnished in populous cities only through the instrumentality of well-equipped water-works. Hence for a city to meet such a demand is to perform a public act, and confer a public blessing. It is not strictly a governmental or municipal function, which every municipality is under obligations to assume and perform, but it is very closely akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. \* \* \* It is the doing of an act for the public weal — a lending of corporate property to a public use. \* \* \* It cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end." While the authorities on the precise question are meager, we think the weight of authority, as well as of reason, tends to sustain the right of the municipality through its proper officers, acting in the exercise of a sound discretion, to furnish light as well as water to its inhabitants, not only in its public places, but in their private houses and places of business.

An additional question is presented and discussed. It is shown by the averments of the complaint that such action as the city authorities have taken, and are proposing to take, is by virtue of a resolution adopted by the city council, and not by virtue of an ordinance, and that, if the city is authorized to erect and operate an electric light plant, it can only do so by virtue of an ordinance duly enacted. In so far as the city derives any authority from the act of March 3, 1883 (Elliott's Supp., § 794 et seq.), it is authorized to act either by resolution or ordinance; but aside from the statute, where the city council has power to act in a given case, and its charter does not prescribe the manner of action, it may accomplish its purpose by resolution as well as by ordinance. Note to *Robinson v. Mayor, etc.*, 34 Am. Dec. 632, and authorities there

cited. The court erred in overruling the demurrer to the complaint. The cause is reversed, at the costs of the appellee, with instructions to the circuit court to sustain the demurrer.\*

**Municipal corporations—power to furnish water or light for private use.**—In the foregoing case it is held that a municipal corporation having express authority to light its streets and public places with electric light and to erect and maintain poles and wires for that purpose, may also erect and maintain works for the manufacture of the electricity and may furnish the electric light for private use. In the case of *Spaulding v. Peabody*, 153 Mass. 129, cited as opposed to this view, it will be found that the town of Peabody was acting under a much more restricted power. According to the review of the statutes applicable to the question, as presented by the court, towns only had express power to establish and maintain street lamps, and the implied power to contract with gas and electric light companies for supplying the light. The question was whether the town had power to “build and equip an electric plant” to light the streets and to “sell for commercial purposes any surplus lighting power.” It was held that it had not. The court says: “The argument is, that if such a town as Peabody can erect and maintain street lamps, it can maintain them by any appropriate means, and that one appropriate means is the construction and maintenance of works for the manufacture and distribution of the gas or electricity which it uses for the purpose of lighting its streets. The extent to which powers will be implied from general words depends a good deal upon the nature of the written instrument the meaning of which is to be determined. In interpreting a constitution of government, the necessities of the government established by the constitution must be considered, and when it appears that there is no attempt specifically to define in the constitution all the powers granted, but that the great objects of the government are described only in general terms, a somewhat liberal construction may be necessary in order that the government may not fail of accomplishing the ends for which it was created. Towns are subordinate divisions of the state, and they vary greatly in the number of their inhabitants and in the amount of their taxable property. It is wholly for the legislature to determine, within the limitations of the constitution, the powers which towns shall possess; and when it appears that the custom of the legislature has been specifically to define from time to time the purposes for which towns may raise money by taxation of their inhabitants, and when the legislature can at any time grant additional powers if they are deemed necessary, a somewhat strict construction of existing statutes is reasonable, and in accordance with the presumed intention of the legislature. Under the special acts, whereby Boston was authorized to maintain street lamps, it could not have been held that the town or city was authorized to engage in the whale fisheries for the purpose of procuring oil. The intention was that the oil for the lamps should be bought as persons generally bought oil used for lights. Towns are authorized to raise money for the support and employment of the poor, but it could not reasonably be held that it was intended that towns should at public expense erect and maintain factories for the manufacture of all clothing which the poor might wear, or of all the

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\* Reported in 28 N. E. Rep'r, 849.

implements which they might use. Towns are authorized to raise money for carrying pupils to and from the public schools, but this could not be held to authorize towns to maintain a street railway or a steam railroad. Towns are authorized to maintain public libraries, but this does not mean that they can maintain paper mills and printing establishments for making books for the libraries. These are undoubtedly extreme examples, but they illustrate the necessity of a somewhat strict construction of the statutes relating to the powers of towns. \* \* \* It cannot be said that the erection of such works as are contemplated by the votes shown in this case are in any strict sense necessary in order to enable the town of Peabody to light its streets. When street lamps were first authorized in Boston, the use of gas or electricity for furnishing light was unknown. Oil, or some similar substance, was used for that purpose then, as it is now used in many places. Gas has now been used for a long time in thickly-settled communities and has been bought for that purpose, yet there is nothing in the statutes indicating that towns may construct and maintain gas-works for the purpose of lighting their streets, except the general words that they may erect and maintain street lamps, and the construction put upon the statutes in practice has been that towns, under the authority conferred by the general laws, have not themselves undertaken to construct and maintain gas-works for lighting the streets. In small towns, the erection and maintenance of such works under a general implied power might involve an expenditure of money which could not well be borne. The subject of constructing and maintaining gas or electric-works for the manufacture of gas or electricity, and the distribution thereof through the streets of towns and cities for the purpose of furnishing light, is one of too much importance to be attached as a mere incident to the power given to erect and maintain street lamps, and we think that, if the legislature had intended that towns generally should have authority to erect and maintain such works, the authority would have been plainly expressed in the statutes, with such limitations and accompanied by such restrictions as the legislature might think it prudent to establish. We see no indications in the existing statutes that the legislature intended to make provisions for the exercise of any such authority by the towns of the commonwealth."

The case of *Mouldin v. City Council of Greenville*, referred to in the principal case, will be found in volume 3 of these reports, page 64. It was there held that under a general authority to provide for the public welfare, a city might purchase, maintain and operate an electric light plant for the purpose of lighting its streets and public places, but that it had no power to furnish light for private use.

The conclusions of the principal case are supported by the analogy of cases relating to municipal water-works. In *Rome v. Cabot*, 28 Ga. 50, it was held that under a general power "to make all contracts they may deem necessary for the welfare of the city," the mayor and council had power to contract for the erection of water-works to supply water for public and private use. See, also, *Wells v. Mayor & Council of Atlanta*, 43 Ga. 67. The same conclusion was reached in *Intendant & Town Council of Livingston v. Pippin*, 31 Ala. 542, where the power conferred was "to pass all such orders, by-laws and ordinances respecting the street or streets, market-buildings, pleasure carriages,

wagons, carts, drays and police of said town, that should be necessary for the security and welfare of the inhabitants thereof, and for preserving health, peace, order and good government within the said town."

## JANIN V. LONDON & SAN FRANCISCO BANK.

(Supreme Court of California, Nov. 19, 1891.)

1. **BANKS AND BANKING. RELATIONS OF BANK TO ITS DEPOSITORS.** A bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction.

2. **PAYMENT OF FORGED CHECK. LIABILITY TO DEPOSITOR.** The payment of a check which, though purporting to be drawn by the depositor, turns out to be a forgery, is made at the peril of the bank and it is not justified in charging it against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is, upon equitable principles, estopped to deny the correctness of such payments.

3. **EFFECT OF NEGLIGENCE OF THE DEPOSITOR IN DISCOVERING AND GIVING NOTICE OF THE FORGERY. STATEMENT OF ACCOUNT BY BANK.** Where the bank, after payment of a forged check, balances the depositor's bank-book, charging him with the forged check and delivers the book with the canceled checks to the depositor, and the latter neglects for an unreasonable time to examine the account, discover and give notice of the forgery, the depositor is not thereby estopped from impeaching the account, but he may prove the forgery and consequent incorrectness of the statement, and the burden will then be upon the bank to show that it has been prejudiced by such negligence, and failing to do this, it will be liable for the amount of the forged check.

4. **SUIT TO RECOVER AMOUNT PAID BY BANK ON FORGED CHECK. INSTRUCTIONS.** Where a bank allowed over three months to elapse before it returned to a depositor a forged check drawn on his account and payable to "currency or bearer," that it had paid without requiring the bearer's indorsement or identification, and there was no evidence that the bank could have retrieved its loss if notified of the forgery, the depositor's neglect within a reasonable time after the return of his canceled checks to examine them, and give notice of the forgery, was not a defense to an action to recover the money paid on such check; and hence the bank was not prejudiced by an erroneous instruction to the effect that the depositor was not guilty of negligence in failing to examine the checks and bank-book, and that he became bound to give notice of the forgery only after he had discovered it.

**I**N bank. Appeal from superior court, city and county of San Francisco, John F. Finn, judge. Action by Janin against the London & San Francisco Bank to recover money deposited

by plaintiff with defendant, and paid by the latter on a forged check. From a judgment for plaintiff, defendant appeals. Affirmed.

*Winans, Balknap & Godoy and John B. Harmon (Jarboe, Harrison & Goodfellow, of counsel) for appellant. W. H. L. Barnes (H. L. Gear, of counsel) for respondent.*

DE HAVEN, J. The plaintiff was a depositor in the bank of defendant, and the controversy in this action grows out of the payment by defendant of a check for \$16,700, purporting to have been signed by plaintiff, and for which amount defendant claims that it is entitled to debit the account of plaintiff. The complaint alleges that this check was a forgery. This is denied in the answer; and as another and separate defense it is averred, in substance, that the plaintiff is estopped to deny the genuineness of said check, because of his negligence in not examining his balanced pass-books and returned checks, including the one in dispute, within a reasonable time, and giving notice that such check was forged, "by reason of which laches defendant was prevented from tracing out the forger of said check or said signature, if it was a forgery, and proceeding against him, for a period of nearly five months, and until all trace of said forger was lost." The defendant also avers that the account between itself and plaintiff had become a stated one. The check was paid on May 29, 1878, and on September 4, 1878, the defendant returned to plaintiff his pass-book, showing the statement of his account at that date, and that he was charged with the amount of this check, which was also returned to him as one of the vouchers. On December 11, 1878, another statement of plaintiff's account was rendered by defendant, in which appeared the balance shown by the previous account. The evidence also tended to show that plaintiff did not at once examine the check in dispute when it was returned to him with his balanced pass-book on September 4, 1873, nor until some time in the month of December, 1878, and that he first intimated to defendant a doubt of its genuineness about December 28, 1878, but did not give notice that he actually claimed it to be a forgery until February 1, 1879.

The verdict of the jury in favor of plaintiff must be deemed, on this appeal, to have conclusively established the fact that the



check was a forgery, as there was evidence sufficient to establish such a finding, and it is not claimed that there was any error in the instructions of the court, so far as they relate to that particular point. It is well settled that a bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. *Crawford v. Bank*, 100 N. Y. 50; 2 N. E. Rep'r, 881; *Bank v. Risley*, 111 U. S. 125; 4 Sup. Ct. Rep'r, 322. All unauthorized payments, such as upon forged checks, are, therefore, made at the peril of the bank, and it is not justified in charging them against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot be well questioned, and finds abundant support in the decisions of courts. *Shipman v. Bank*, 126 N. Y. 318; 27 N. E. Rep'r, 371; *Hardy v. Bank*, 51 Md. 562; *Weinstein v. Bank*, 69 Tex. 38; 6 S. W. Rep'r, 171; *Bank v. Morgan*, 117 U. S. 96; 6 Sup. Ct. Rep'r, 657.

It is not claimed in this case that plaintiff was guilty of any prior negligence which induced the defendant to pay the check in dispute, and we are, therefore, to consider only the one general question, whether, upon the evidence before it, the court committed any error to the prejudice of the defendant in giving or refusing instructions relating to the defense of estoppel, and this we proceed to do. The plaintiff was in no manner responsible for the action of the defendant in paying the check. In making such payment it parted with its own money, and not that of plaintiff; and the loss consequent thereon was its own, and should not be transferred to the plaintiff, unless, from all the circumstances in the case, it appears reasonably probable that but for his alleged negligence, the defendant could have protected itself. The defendant has not in fact discharged its indebtedness to plaintiff, and should not be permitted to debit him with any amount as an offset thereto unless it appears that by reason of the negligent conduct of plaintiff it has omitted to take proceedings which

it otherwise would and could have taken to indemnify itself from loss. This seems to us clear upon the plainest principles of justice. The balancing of the pass-book in September, and charging the plaintiff therein with the amount of this check, and its return to him at the same time constituted a statement of the account between himself and the defendant; and it thereupon became the duty of the plaintiff to examine the same within a reasonable time, and give to defendant, without unreasonable delay, notice of any objection which he had to it, and, unless such objection was made within a reasonable time, it became an account stated, and there was imposed upon the plaintiff the burden of showing that the check with which he was debited was a forgery; and in addition to this, if the circumstances attending the entire transaction were such as to make it reasonably probable that the bank had suffered prejudice by plaintiff's unreasonable acquiescence in the account as stated, he would not be permitted to open the account by proof of its incorrectness.

Upon the trial the court instructed the jury, in substance, that if they found that the check in dispute was a forged one, they must find for the plaintiff, unless it was shown that plaintiff's failure to examine his checks deprived the defendant of an opportunity to save itself from loss on account of the money paid thereon; and they were further instructed that, if "the plaintiff was guilty of negligence in respect to his treatment of his checks, including the disputed check, after he received them at the September balancing and the December balancing, or by reason of his making the discovery of the forgery, or of the facts which put him on inquiry respecting it some months before he gave any notice to the bank of such discovery, whereby the bank was or may have been injured, they may find for the defendant." So far this was a correct statement of the law, and with other instructions given, conveyed to the jury with sufficient clearness the law as we have declared it. But the court also gave the following: "In considering the fact that Mr. Janin's bank-book was balanced, and that the bank's statement of the balance was apparently acquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract to the bank to examine with diligence his return checks and the bank-book. In contemplation of law, the book was balanced and the checks returned for the

protection of the depositor, not for the protection of the bank; and when Mr. Janin failed to examine it, the only consequence was that the burden of proof was shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the statute of limitations." This instruction, although supported by the authority of *Weisser v. Denison*, 10 N. Y. 68, is not, in our opinion, entirely correct, and is in conflict with other instructions referred to. When considered in connection with a portion of another instruction given, to the effect that it "was sufficient to give notice when the forgery was discovered," this clearly implied that plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to consider whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule. This error, however, will not, in view of the undisputed evidence, justify a reversal of the judgment. Conceding that the plaintiff was guilty of negligence in not earlier examining his checks, discovering the forgery, and giving notice thereof, there is nothing in the evidence from which it can be reasonably inferred that the defendant sustained any loss thereby, or that its position with reference to the check, because of not having earlier notice, was in any manner changed to its disadvantage, and the court would have been justified in so charging the jury. The check was paid on May 29, 1878; and it was not until September 4, 1878, that it was returned to plaintiff. The check was payable to "currency or bearer," and when paid the person who presented it was not identified, or required to indorse it. This case was tried in 1885, and there is nothing in the evidence pointing to the fact that if notice had been given on the very day the check was returned, the defendant would have been in any better position to discover the forger, or the person who uttered it, or to avail itself of any of the coercive measures known to the law by which to retrieve its loss, than it was at the time it received notice. If plaintiff was negligent, it was not shown that the defendant suffered any damage thereby, and for that reason such negligence cannot be allowed as a defense to plaintiff's right to recover in this action.

There may be some general language in the case of *Bank v.*

Morgan, 117 U. S. 115; 6 Sup. Ct. Rep'r, 657, which would seem to imply that it is not necessary that the evidence should tend to show that any pecuniary benefit would have accrued to the defendant if reasonable notice had been given it; but this general language is limited by the facts of that case, and the more specific rule which the court announced, viz.: "Still further, if depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was thereby prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding to compel restitution." In the case of *Continental Nat. Bank v. National Bank*, 50 N. Y. 576, cited by appellant, it is said that the arrest and detention of a swindler are powerful means of coercing restoration of property, and that the loss of this means in relying upon the declaration of another would estop such person from denying the truth of the statement upon which reliance was made. But this language is to be considered in connection with the particular facts then before the court, from which it appears that the declaration held to be an estoppel was the direct admission of the genuineness of the check afterward claimed to be forged, and that, "had the teller of the certifying bank disclaimed the forged certificate and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the Bank of the State of New York before he had received the money on the gold checks, and before he went to the subtreasury with his gold certificates." *White v. Bank*, 64 N. Y. 322. The distinction between such a case as that and one like this, in which there is nothing in the evidence to indicate that all trace of the forger was not lost before the check in controversy was returned to plaintiff, months after its payment, is a marked one; and in *White v. Bank*, just cited, what we conceive to be the rule applicable to the facts in this record is thus stated: "In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if

a proper foundation is laid for them in other respects." There is nothing in *Bank v. Keene*, 53 Me. 103, in conflict with this. In that case, and upon its peculiar facts, it was held proper to instruct the jury "that, if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security from Judson by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature." But, of course, to justify such an instruction, there must be some evidence tending to show the facts upon which it is predicated. In this case the burden of proof to show that it sustained damage or injury by the negligence of plaintiff was upon the defendant, and this it was required to show by evidence having some reasonable tendency to establish such fact. In order to justify the submission of any question of fact to the jury the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference the court may properly refuse to submit the question to the jury, and in our opinion the evidence in this case was not such as would have warranted the jury in finding as a fact that the delay of plaintiff in giving it notice that the check in question was a forgery, lost to it any rights or remedies which otherwise it might have resorted to, in order to save itself from the loss incurred by its own mistake or negligence in the first instance, and which it now asks the plaintiff to bear, and, therefore, the error we have pointed out in the instruction of the court was without prejudice to the defendant. Judgment and order affirmed.\*

We concur: Beatty, C. J.; Sharpstein, J.; Garoutte, J.; McFarland, J.

Harrison, J., being disqualified, did not participate in the foregoing opinion.

Paterson, J., dissents.

**Banks and banking — forged checks.**—See *Deposit Bank v. Fayette National Bank*, 2 Am. R. R. & Corp. Rep. 296; *Shipman v. Bank of State of New York*, 4 Am. R. R. & Corp. Rep. 608, and cases cited in note.

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\* Reported in 27 Pac. Rep'r, 1100; 93 Cal. 14.

EGERER v. NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, Second Division, Dec. 1, 1891.)

1. EMINENT DOMAIN. VACATION OF STREET AND OCCUPATION OF SAME BY A RAILROAD. RIGHTS OF ABUTTING OWNER. The city authorities of Rochester vacated the street in front of plaintiff's premises and the same was occupied by the defendant company, which erected at that point a stone abutment and earth embankment about fourteen feet high, upon which its road was built and operated pursuant to statutory authority. The space between the embankment and the plaintiff's lot was too narrow to admit of the approach of teams and there was no other access to the plaintiff's premises. Held, that the plaintiff had a right of access to her premises over the street, which was property and of which she could not be deprived without compensation; that the interference with such right of access by the vacation of the street and construction of the embankment, was a taking of the plaintiff's property, within the meaning of the constitution, and that she could maintain a suit for damages against the defendant, for its unlawful interference with such right of access.

**A** PPEAL from supreme court, general term, fifth department. Reversed. Action by Frederika Egerer against the New York Central and Hudson River Railroad Company for damages to real estate. Judgment was ordered for defendant on plaintiff's exceptions heard at general term in the first instance. Plaintiff appeals. The other facts fully appear in the following statement by Potter, J.:

This action was tried at the Monroe circuit on January 25, 1886. At the close of the evidence the court directed a verdict for the defendant, to which plaintiff excepted, and the court thereupon ordered the exceptions to be heard at the general term in the first instance. The principal facts in the case are that plaintiff's premises are situated upon North avenue, formerly North street, which has been a street in use by the general public for many years, and afforded access to plaintiff's premises. Under the act of the legislature (chap. 147, Laws 1880), the defendant was allowed to agree with commissioners appointed by the act upon behalf of the city of Rochester, upon a plan to elevate the track along and across the streets in said city, to close up streets, and to change the location of defendant's tracks. In carrying out the plan, the portion of said street in front of plaintiff's premises was discontinued, and the defendant erected at that point an abutment of stone and an earth embankment about fourteen feet in

height, and upon it placed its rails and structure and operated its road, leaving but a narrow space between it and plaintiff's premises, insufficient to admit of the approach of a team and carriage to them. The defendant had acquired, previously to the time of discontinuing the street, the fee of the same for railroad purposes, subject to a use for the general public. The plaintiff's premises had for several years previously, and at the time of said change, been used as a hotel and boarding-house, and the rental value of the same had been diminished in consequence of these changes, and compensation had not been made to plaintiff for the alleged interference with plaintiff's rights and the injuries. Other facts will be found in the opinion.

*Raines Bros.* for appellant. *Harris & Harris* for respondent.

POTTER, J. (after stating the facts). The action is brought to recover damages occasioned to plaintiff's means of access to her building and premises, and to the air and light incident thereto, in consequence of the structure of defendant in front of or near the plaintiff's premises. A street or highway is principally designed and devoted to the use of the public to travel upon with teams and carriages and upon foot, and it may not be used for any other purpose, except it be a quasi public use, such as a railroad carrying persons and freight under certain limitations. *People v. Kerr*, 27 N. Y. 188; *Kane v. Railroad Co.*, 125 N. Y. 164; 26 N. E. Rep'r, 278. Certain town and city officers are made by law trustees of highways and streets, and are charged with the care of them, and their legitimate use for the purpose of ordinary travel and passage by teams, vehicles and persons on foot. The officers having charge of ordinary country roads have not the absolute power to lay out a new or to close an old highway. They cannot do either of said acts without the consent of the owners or abutters, or a course of legal procedure prescribed by statute after notice to the owners, abutters and those interested, and the verdict of a jury, and the assessment and payment of the damages sustained in consequence of the laying out of a new, or the discontinuance of an old, road. See the various provisions of article 4, title 1, chapter 14, part 1, Revised Statutes, and the Laws of 1882, chapter 317. The charters of all cities, so far as I have had occasion to examine or observe them, contain similar provisions restricting

the exercise of the power to open or close streets by municipal authority. I find the following in section 167, subdivision 4, of the charter of the city of Rochester upon this subject, viz.: "The executive board, whenever authorized by the common council, shall have the same power with respect to said city, to discontinue any street therein, as is now by law possessed by commissioners of highways of towns, with respect to roads in towns; and the same proceedings shall be had, and the same appeal shall lie, from the decision of the said executive board, and the same proceedings shall be had on such appeal as are now provided by law in reference to towns so far as applicable." I do not at all question the power of the legislature to open and to close streets and highways within the constitutional limits, but I refer to these restrictions to show the safeguards and protection to the citizen which the legislature has imposed upon the public officers in the exercise of the power to open and close streets and highways. But the legislature itself may not exercise this power absolutely and without regard to the rights of the citizen. The constitution imposes the restraint upon the legislature that it shall not appropriate private property to public uses without just compensation therefor to the owner of the property. Art. 1, § 6; *Abendroth v. Railroad Co.*, 123 N. Y. 1; 25 N. E. Rep'r, 496.

Had the plaintiff any rights to air, light or access as "abutting owner" of lands bounded upon the street which was closed as a street, and upon which "all the structures of the defendant complained of in this case are situate?" The street which was occupied by defendant's structures in this case had been in the use of the general public as a street for more than fifty years, and the plaintiff and her grantors had used the access which it afforded to her house and premises for that period of time. The structures complained of practically destroyed the only access to the plaintiff's premises with a team and wagon, and the annual rental value of the plaintiff's premises was diminished in consequence of the defendant's structures by the sum of four or five hundred dollars. It has been held by this court, and recently by each division of it, that an owner of a lot adjoining a city street, although his title extends only to the side of the street, and he has no ownership of the land or interest therein save as abutting owner, has incorporeal private rights therein, which are incident to his property, and



which may be so impaired as to entitle him to damages. Such rights are private property within the provision of the state constitution (art. 1, § 6) which forbid the taking of private property for public use without just compensation. It is no justification, therefore, for the impairment that the act complained of was done pursuant to legislative authority. *Abendroth v. Railroad Co.*, 122 N. Y. 1; 25 N. E. Rep'r, 496. "The owners of lots abutting on a city street, the fee of which is in the municipality, have, by virtue of proximity, special and peculiar rights, facilities and privileges therein, in the nature of easements, which are not common to the citizen, and constitute property of which they cannot be deprived by the legislature or the municipality, or both, without compensation; and any use of such street inconsistent with its use as a public street, which interferes with these easements, is a taking of property, for which said owners are entitled to compensation to the extent of the damages occasioned thereby." *Kane v. Railroad Co.*, 125 N. Y. 165; 26 N. E. Rep'r, 278. Since the able and exhaustive examination which this question has received in the opinions of the court in the two cases last referred to, there is no occasion for further discussion of it. These cases hold, and they are supported by numerous authorities, that though the defendants therein had constructed and run their roads under authority of the legislature and of the municipality, yet there was a right of access to the plaintiff's premises, for substantial interference with which defendant was liable, and that the plaintiff could not be deprived of such right without just compensation.

We come, now, to the more particular consideration of the question whether a party enjoying the rights of light, air or access may be deprived of such rights by the action of the municipal authority in the discontinuance of the street in respect to which such rights exist, without compensation therefor or any provision for compensation. This question may be considered as simply a discontinuance of the street in question, within the power and discretion possessed by the proper officers of the city of Rochester, or as a discontinuance or an alteration of this street by municipal authority, or by commissioners acting for the municipality, under an act of the legislature in connection with and in furtherance of the convenience and advantages of the defendant's railroad. Can the city exercise such power in a manner that shall deprive a citizen of the

right of access to his premises while affording or leaving him no other access? We have seen, from the cases above cited, that a municipality cannot divest the citizen of such rights, even where the municipality grants the right of laying the tracks and running the cars of a railroad along one of the streets of a city which is still devoted to and used by the general public as a street. Under the provisions of the statute in relation to country roads, and, as I apprehend, under those of most city and village charters as to streets and roads in cities and villages, the officers having them in charge cannot arbitrarily abandon or discontinue them. The statute provides a regular mode of procedure, with compensation, to effect a discontinuance of them. The question of the right or power of a municipality to discontinue a street has frequently been presented to the courts of this state, and it has been held that the authorities might do so when it is done in the manner prescribed by law, and when there is left to the private citizen other and suitable means of access. To that effect are the cases of *Radcliff Ex'rs v. Mayor, etc.*, 4 N. Y. 195; *Coster v. Mayor, etc.*, 43 N. Y. 399; *Fearing v. Irwin*, 55 N. Y. 490.

But it will be observed, upon an examination of these cases, that they clearly and distinctly recognize the right of access, and that the owner of such rights cannot be deprived of a street affording him access to his premises unless there is left for his use and enjoyment other suitable means of access, or the payment of a just compensation for the deprivation of the same. Such was the character of the case of *Wilson v. Railroad Co. (Sup.)*, 2 N. Y. Supp. 65, forming a part of the brief of respondent's counsel, and upon the authority of which the learned general term seems to have relied in the decision of this case. In that case the plaintiff's lot extended from King to Litchfield streets, in the city of Rochester. The defendant, under chapter 147, Laws 1880 (the act in question in this case), closed up Litchfield street, but left the access afforded by King street; in short, did not deprive the plaintiff of the means of access to his lot. I am not disposed to adopt the doctrine that a municipality may close up a street upon which abutting owners have built expensive structures for residences and business, and enjoyed access to them from the street so closed for many years, arbitrarily, and without compensation for the injuries done to such rights. Such rights are substantial

and essential rights for the enjoyment of property and are appurtenances thereto. *Abendroth v. Railroad Co.*, 122 N. Y., at page 15 of the opinion, and the cases there cited; *Kane v. Railroad Co.*, 125 N. Y., page 183, and cases there cited. It would thus seem that the plaintiff could not be deprived of her rights if the city of Rochester itself, under any power that may reside in its municipal charter, had closed the street, and debarred the plaintiff from the enjoyment of those rights without making or providing compensation therefor. But it may be contended that that view is not the real aspect in which this case is to be considered and decided. The municipality of the city of Rochester did not directly close this street, and in that way interfere with the plaintiff's rights, and that we may not here discuss, or decide the liability of the city for that act, as it is not a party to the action. The defendant, the railroad company, did the act complained of; and this action is brought against that company for its agency in interfering with and violating plaintiff's rights. The railroad company had laid its track upon this street with the consent of the city of Rochester, and by virtue of its right under condemnation proceedings. The right it acquired under the latter proceeding was the right to use this street to lay its track and run its cars, subject to the older and superior rights of the general public to use the street, and, as we have seen, subject to the rights of the abutters to access, air and light.

Now, it seems to follow, as a conclusion from these premises, that if neither the state nor the city of Rochester could legally close this street, without making compensation to the abutting owners, the defendant railroad company acquired no right to erect its structures in such abandoned or discontinued street. *Stetson v. Faxon*, 19 Pick. 147. And if the street had not been legally discontinued then the right of the railroad company is still limited as it was when it was first acquired, and is subject to the rights of the plaintiff in respect to the easements and the rights of the general public in respect to travel and passage. When, therefore, the defendant placed the structures complained of in the street, it violated the rights of the plaintiff in a much more marked manner, than was done by the elevated railroad companies in the *Abendroth* and *Kane* Cases, *supra*, and for which this court held them liable in damages. Since examining this case, and writing the views

and the conclusions above expressed I have had an opportunity of perusing the very able and interesting opinion of Judge Andrews in the case of *Riening v. Railroad Co.*, 28 N. E. Rep'r, 640 (recently decided, but not yet in the regular reports). The facts in that case were briefly these: The defendant road was located upon Water street in the city of Buffalo. Plaintiff's building was located upon premises fronting and abutting said street. Upon the east of plaintiff's premises was Commercial street, and upon the west was Maiden Lane street. The municipal authorities of the city of Buffalo authorized the defendant in that case to raise the grade of Water street some five or six feet in front of plaintiff's premises, and extending beyond the crossing of Commercial street, and leaving a strip of some nine feet in width along the north side of Water street for a wagon-way and a strip fourteen feet wide for a sidewalk at the former grade. The raised grade was twenty-four feet wide, and was supported by stone walls, and was paved and used as a street when that action was commenced. The learned judge in his opinion reviewed the cases bearing upon this subject, and distinguished it from the case of *Fobes v. Railroad Co.* 121 N. Y. 505; 24 N. E. Rep'r, 919, upon which the defendant in that case sought to sustain the defense; and held that the raising of the grade of the street in that manner, even under the license of the authorities of the city of Buffalo, was a violation of the plaintiff's rights of access, though the plaintiff had no title to the land within the lines of the street; and that the defendant was liable for the damages plaintiff had sustained. The case under consideration is a much stronger case than the case cited. In the case under consideration the obstructions prevented access to the plaintiff's premises with a team and vehicle. In the case referred to it made it inconvenient to approach plaintiff's premises in that manner. We think the direction of a verdict for the defendant was error, and that the question of plaintiff's damages should have been submitted to the jury. The judgment should be reversed, and a new trial granted, with costs to abide event. All concur except Bradley and Haight, JJ., not sitting.

**Vacating street—rights of abutting owners.**—The foregoing case fully bears out the conclusions reached in note to *Hielscher v. City of Minneapolis*, ante, p. 115. See, also, *Glasgow v. St. Louis*, ante, p. 192. The case pre-

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\* Reported in 29 N. E. Rep'r, 95; 130 N. Y. 106.

ents a similar state of facts to that before the supreme court of Iowa in *Barr, v. City of Oskaloosa*, 45 Iowa, 275, but announces a conclusion directly opposite to that of the Iowa court and one more in harmony with logic and justice.

Statutes providing for the vacation of streets, not infrequently require that compensation shall be made to those who are damaged thereby. See *Appeal of Rice*, 142 Penn. St. 601; 21 Atl. Rep'r, 974.

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### MAINE V. GRAND TRUNK RY. CO. OF CANADA.

(Supreme Court of the United States, Dec. 14, 1891.)

1. RAILROAD COMPANIES. FOREIGN CORPORATIONS. EXCISE TAX. INTER-STATE COMMERCE. The act Maine, 1881, requires every corporation, etc., operating a railroad in the state, to pay "an annual excise tax for the privilege of exercising its franchises," the amount of the tax to be determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the year preceding the levy of the tax. Held, that the method of determining the amount of the tax is merely a way of ascertaining the value of the privilege, and does not render the tax a tax upon the receipts themselves, and hence, in its application to railroads which enter the state from another state or from Canada, the act does not operate as a regulation of interstate or foreign commerce.

IN ERROR to the circuit court of the United States for the district of Maine. Suit by the state of Maine to recover taxes from the Grand Trunk Railway Company of Canada. Judgment for defendant. Plaintiff brings error. Reversed. The facts of the case fully appear in the following statement by Mr. Justice Field:

The defendant is a corporation created under the laws of Canada, and has its principal place of business at Montreal, in that province. Its railroad in Maine was constructed by the Atlantic and St. Lawrence Railroad Company under a charter from that state, which authorized it to construct and operate a railroad from the city of Portland to the boundary line of the state; and, with the permission of New Hampshire and Vermont, it constructed a railroad from that city to Island Pond, in Vermont, a distance of one hundred and forty-nine and one-half miles, of which eighty-two and one-half miles are within the state of Maine. In March, 1853, that company leased its rights and privileges to the defendant, the Grand Trunk Railway Company, which had obtained legislative permission to take the same; and since then it has op-

erated that road, and used its franchises. A statute of Maine, passed in 1881, enacted that every corporation, person or association operating a railroad in the state should pay to the state treasurer, for the use of the state "an annual excise tax for the privilege of exercising its franchises" in the state; and it provided that the amount of such tax should be ascertained as follows: "The amount of the gross transportation receipts, as returned to the railroad commissioners, for the year ending on the 30th of September next preceding the levying of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile. When such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one-quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars, and do not exceed three thousand dollars, the tax shall be equal to one-half of one per centum of the gross receipts; and so on, increasing the rate of the tax one-quarter of one per centum for each additional seven hundred and fifty dollars of average gross receipts per mile, or fractional part thereof; provided, the rate shall in no event exceed three and one-quarter per centum. When a railroad lies partly within and partly without this state, or is operated as a part of a line or system extending beyond this state, the tax shall be equal to the same proportion of the gross receipts in this state, as herein provided, and its amount determined as follows: The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this state." The act also provided that the governor and council, on or before the 1st of April in each year, should determine the amount of such tax and report the same to the state treasurer, who should forthwith give notice thereof to the corporation, person or association upon which the tax was levied, and that such tax should be due and payable, one-half on the 1st of July next after the levy, and the other half on the 1st of October following; and it declared that if any party should fail to pay the tax as required, the state treasurer might proceed to

collect the same, with interest at the rate of ten per centum per annum, by an action of debt in the name of the state. The defendant, the Grand Trunk Railway Company, made no returns as a corporation, but it furnished the *data* and caused the Atlantic and St. Lawrence Railroad Company to make a return of the gross transportation receipts over its road, one hundred and forty-nine and a half miles in length, including the eighty-two and a half miles in Maine, for the years 1881 and 1882, and upon this return the governor and council, pursuant to the statute, ascertained the proportion of the gross receipts in the state, and assessed the tax in controversy accordingly. The tax thus assessed for 1881 was \$9,569.66, and for 1882, \$12,095.56; and, to recover these amounts, as debts to the state, the present action was brought in the supreme judicial court of the state of Maine, and on application of the defendant it was transferred to the circuit court of the United States. The defendant pleaded *nil debit*, accompanied with a statement of special matters of defense. By stipulation of the parties, the case was tried by the court, which held that the imposition of the taxes in question was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of congress under the constitution of the United States, and was, therefore, invalid. It accordingly gave judgment for the defendant, that the plaintiff take nothing by its writ, and that the defendant recover its costs. From that judgment the case is brought to this court on writ of error.

*C. E. Littlefield* for plaintiff in error. *A. A. Strout* for defendant in error.

Mr. Justice FIELD, after stating the facts as above, delivered the opinion of the court.

The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the state of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the state to levy, there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises.

It is used more frequently, in this country, in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a state is generally one of value, and often of great value, and the subject of earnest contentation. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state, in its judgment, may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and, therefore, in conflict with the exclusive power of congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts, and to a certain percentage of the same, in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and, therefore, an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained



were specifically imposed as the tax, no objection to its validity would be pretended. And if the inquiry of the state as to the value of the privilege were limited to receipts of certain past years, instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected; and if not, we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact. They constitute, as said above, simply the means of ascertaining the value of the privilege conferred.

This conclusion is sustained by the decision in *Insurance Co. v. New York*, 134 U. S. 594; 10 Sup. Ct. Rep'r, 593. The Home Insurance Company was a corporation created under the laws of New York, and a portion of its capital stock was invested in bonds of the United States. By an act of the legislature of that state, of 1881, it was declared that every corporation, joint-stock company or association then or thereafter incorporated under any law of the state, or of any other state or country, and doing business in the state, with certain designated exceptions not material to the question involved, should be subject to a tax upon its corporate franchise or business, to be computed as follows: If its dividend or dividends made or declared during the year ending the 1st day of November amounted to six per centum or more upon the par value of its capital stock, then the tax was to be at the rate of one-fourth mill upon the capital stock for each one per cent of the dividends. A less rate was provided where there was no dividend or a dividend less than six per cent. The purpose of the act was to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there were no dividends, according to the actual value of the capital stock during the year. The tax payable by the company, estimated according to its dividends, under that law aggregated \$7,500. The company resisted its payment, asserting that the tax was in fact levied upon the capital stock of the company, contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States bore to its capital stock, and that the law requiring a tax without such reduction was unconstitutional and void. It was held that the tax was not upon the capital

stock of the company, nor upon any bonds of the United States composing a part of that stock, but upon the corporate franchise or business of the company, and that reference was only made to, its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year. And the court said: "The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

The case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, in no way conflicts with this decision. That was the case of a tax, in terms, upon the gross receipts of a steamship company, incorporated under the laws of the state, derived from the transportation of persons and property between different states and to and from foreign countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid.

It follows from what we have said, that the judgment of the court below must be reversed and the cause remanded, with directions in favor of the state for the amount of the taxes demanded and it is so ordered.\*

Mr. Justice Bradley dissenting.

Justices Harlan, Lamar, Brown and myself dissent from the judgment of the court in this case. We do so both on principle and authority. On principle, because, while the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the state of Maine, the mode of doing this is unconstitutional. The mode adopted is the laying of a tax on the gross receipts of the company, and these receipts of course include receipts for interstate and international transportation between other states and Maine, and between Canada and the United States. Now, if, after the previous legislation which has been adopted with regard to admitting the company to carry on business within the state, the legislature has

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\* Reported in 12 Sup. Ct. Rep'r, 131; 143 U. S. 217.

still the right to tax it for the exercise of its franchises, it should do so in a constitutional manner, and not (as it has done) by a tax on the receipts derived from interstate and international transportation. The power to regulate commerce among the several states (except as to matters merely local) is just as exclusive a power in congress as is the power to regulate commerce with foreign nations and with the Indian tribes. It is given in the same clause, and couched in the same phraseology; but if it may be exercised by the states it might as well be expunged from the constitution. We think it a power not only granted to be exercised, but that it is of first importance, being one of the principal moving causes of the adoption of the constitution. The disputes between the different states in reference to interstate facilities of intercourse, and the discriminations adopted to favor each their own maritime cities, produced a state of things almost intolerable to be borne. But, passing this by, the decisions of this court for a number of years past have settled the principle that taxation (which is a mode of regulation) of interstate commerce, or of the revenues derived therefrom (which is the same thing), is contrary to the constitution. Going no further back than *Pickard v. Car Co.*, 117 U. S. 34; 6 Sup. Ct. Rep'r, 635, we find that principle laid down. There a privilege tax was imposed upon Pullman's Palace-Car Company, by general legislation, it is true, but applied to the company, of \$50 per annum on every sleeping-car going through the state. It was well known, and appeared by the record, that every sleeping-car going through the state carried passengers from Ohio and other northern states to Alabama, and *vice versa*, and we held that Tennessee had no right to tax those cars. It was the same thing as if they had taxed the amount derived from the passengers in the cars. So, also, in the case of *Leloup v. Port of Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep'r, 1380, we held that the receipts derived by the telegraph company from messages sent from one state to another could not be taxed. So in the case of *Railroad Co. v. Pennsylvania*, 136 U. S. 114; 10 Sup. Ct. Rep'r, 958, where the railroad was a link in a through line by which passengers and freight were carried into other states, the company was held to be engaged in the business of interstate commerce, and could not be taxed for the privilege of keeping an office in the state. And in the case of *Crutcher v.*

Kentucky, 141 U. S. 47; 11 Sup. Ct. Rep'r, 851, we held that the taxation of an express company for doing an express business between different states was unconstitutional and void. And in the case of *Steam-Ship Co. v. Pennsylvania*, 122 U. S. 326; 7 Sup. Ct. Rep'r, 1118, we held that a tax upon the gross receipts of the company was void, because they were derived from interstate and foreign commerce. A great many other cases might be referred to showing that in the decisions and opinions of this court this kind of taxation is unconstitutional and void. We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a "tax on a franchise." It is so called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation. This court and some of the state courts have gone a great length in sustaining various forms of taxes upon corporations. The train of reasoning upon which it is founded may be questionable. A corporation, according to this class of decisions, may be taxed several times over. It may be taxed for its charter, for its franchises, for the privilege of carrying on its business; it may be taxed on its capital, and it may be taxed on its property. Each of these taxations may be carried to the full amount of the property of the company. I do not know that jealousy of corporate institutions could be carried much further. This court held that the taxation of the capital stock of the *Western Union Telegraph Company* in *Massachusetts*, graduated according to the mileage of lines in that state compared with the lines in all the states, was nothing but a taxation upon the property of the company; yet it was in terms a tax upon its capital stock, and might as well have been a tax upon its gross receipts. By the present decision it is held that taxation may be imposed upon the gross receipts of the company for the exercise of its franchise within the state, if graduated according to the number of miles that the road runs in the state. Then it comes to this: A state may tax a railroad company upon its gross receipts in proportion to the number of miles run within the state as a tax on its property, and may also lay a tax upon these same gross receipts in proportion to the same number of miles for the privilege of exercising its franchise in this state! I do not know what else it may not tax the gross receipts for. If the interstate commerce of the country is not or will not be handicapped by this

course of decision, I do not understand the ordinary principles which govern human conduct. We dissent from the opinion of the court.

1. **Corporate taxation—words "capital stock" construed.**—Under the act of 1857 (Laws N. Y. 1857, chap. 456, § 3), providing that "the capital stock of every company liable to taxation, \* \* \* together with its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, \* \* \* shall be assessed at its actual value, and taxed in the same manner as the other real estate and personal estate in the county," it is the capital of the company that must be valued and assessed, and not the share stock held by the corporators. *People, ex rel. Union Trust Co., v. Coleman*, 126 N. Y. 483; 27 N. E. Rep'r, 818.

2. **Mode of assessing the capital stock under New York statute.**—It is only when the value of the capital stock is unknown to the assessors that they may consider the value of the shares as indicative of that of the capital; and where the amount and value of the capital are disclosed, and the assessors have no reason to disbelieve the statement, they cannot assess the capital stock at a valuation derived from the market value of the shares. *Ibid.*

3. **Shares of stock when not assessable under Indiana statute.**—Revised Statutes Indiana 1881, sections 6305, 6308, which provide that the property of a corporation shall not be assessed at a greater rate than that of an individual, and that, "where the tangible property or the capital stock of an incorporated company is listed and assessed, the shares of capital stock of such incorporated company shall not be listed and assessed," clearly prohibits the assessment of the capital stock where the entire capital is invested in tangible property which is duly listed and returned for taxation. *Hyland, Auditor, v. Brazil Block Coal Co.*, 128 Ind. 335; 28 N. E. Rep'r, 673.

4. **Practice—enjoining tax on shares—whether tender of tax on tangible property essential.**—Where the entire capital stock of a corporation is invested in tangible property duly assessed, the corporation need not, in order to restrain the collection of a tax on the capital stock, make a tender of the taxes due on its tangible property, as no tax whatever is due on the capital stock. *Ibid.*

## NORTHWESTERN NAT. BANK OF CHICAGO V. BANK OF COMMERCE OF KANSAS CITY.

(Supreme Court of Missouri, Division No. 2, Dec. 2, 1891.)

1. **BANKS AND BANKING. PAYMENT OF FORGED DRAFT BY DRAWEE TO BONA FIDE HOLDER. LIABILITY OF LATTER.** The drawee of a bill of exchange or draft is bound to know the handwriting of his customer, the drawer; and if he pays a bill or draft in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill or draft turns out to be a forgery.

2. INDORSEMENT "FOR COLLECTION." EFFECT. The indorsement of a draft "for collection" limits the effect which would have been given to a general or blank indorsement, and warns parties dealing with it that there is no intent to transfer the ownership or proceeds of the draft.

3. FACTS HELD TO SHOW ONE TO BE A BONA FIDE HOLDER OF A FORGED DRAFT. W., on December 17, 1885, presented to defendant bank at Kansas City a letter of introduction from a bank at Nevada, showing his genuine signature, and also a certificate of deposit, a small portion of which he collected, leaving the balance on deposit. He rented an office, and December 22 employed a book-keeper. On the same day he deposited with defendant a draft on New York for \$3,500, drawn by an Omaha bank, and on December 23 drew \$2,500. On the afternoon of the same day he deposited a draft for \$4,000, drawn by an Omaha bank on plaintiff bank at Chicago. On December 24 he drew \$4,500, and left town. At that time his balance in defendant bank was \$550. Defendant, December 24, sent the draft of \$4,000 to its correspondent in Chicago, "for collection," and it was paid by plaintiff bank, the drawee, through the Chicago clearing-house, on December 26. January 4 it was sent to the drawer bank at Omaha, where it was found to be a forgery. The officers of the Omaha bank, as well as the clerk whose name was signed to the draft, at first thought it genuine. Due notice of the forgery was given to all parties, but W. could not be found. Held, that defendant was not negligent in its dealings with W., either before or after presentation of the draft, and that it was a *bona fide* owner of the draft; that by its indorsement of the same "for collection," it only guaranteed the genuineness of the payee's signature, and retained the title thereto until it was paid by the drawee bank, of which fact the latter had notice by such indorsement, and an action would not lie by the drawee to recover the amount thereof.

**A**PPEAL from circuit court, Jackson county, T. A. Gill, judge. Action by the Northwestern National Bank of Chicago against the Bank of Commerce of Kansas City to recover the amount paid on a forged draft. Plaintiff appeals from a judgment for defendant. Affirmed.

*C. O. Tichenor and Lathrop, Morocco & Fox* for appellant.  
*Karnes, Homes & Krauthoff* for respondent.

THOMAS, J. On the 17th day of December, 1885, a man calling himself John Whitney presented to the paying teller of defendant bank the following letter: "Citizens' Bank of Nevada, Nevada, Mo., 12-16-85. To Bank of Commerce, Kansas City, Mo.: This will introduce to you Mr. John Whitney, who holds our certificate of deposit for \$350 of this date. He will want to draw the money there. Below we give his signature for identification. Yours truly, C. K. Caldwell, Cashier; John Whitney."

Whitney, when at the bank, acted in the ordinary way, and there was nothing about his manners or looks that attracted the attention of the officers of the bank. He left the certificate of deposit for \$350, receiving \$50 cash, and a credit for the balance. He rented a room on Main street in Kansas City. On the 20th day of December he advertised in the *Kansas City Times* for a book-keeper, and on the 22d of that month one H. P. Brown, who went to that city in October in the same year, applied to Whitney for employment. When Brown reached Whitney's office it was wholly unfurnished, but on the same day Whitney bought a table, two chairs and some writing material. Brown was employed at \$15 per week and expenses while away. Whitney informed him that he had ordered office furniture from Chicago, and took him to defendant bank, and introduced him as his book-keeper to the officers, stating he was engaged in the cattle business, would need a good deal of currency, and would probably send checks by Brown to be cashed, and which the bank should cash when presented by him. In the afternoon of the same day Whitney handed Brown two checks for \$3,500 each, drawn by the United States National Bank of Omaha on a New York bank in favor of Whitney, and directed him to deposit one with the defendant and the other with the Citizens' National Bank, which was done. The next morning Whitney drew two checks of \$2,500 each — one on defendant, and the other on the Citizens' National Bank — both payable to the order of Brown. These were paid, and the money given to Whitney about 10 o'clock in the morning. In the afternoon of the same day (December 23) Whitney handed Brown a draft of which the following is a copy: "United States National Bank of Omaha, \$4,000. Omaha, Nebraska, Dec. 21, 1885. If duplicate unpaid, pay to the order of John Whitney four thousand dollars in current funds. To Northwestern National Bank, Chicago, Ill. M. T. Barlow, Cashier. No. 211,573. pp. C. Will Hamilton. [Indorsed]: John Whitney"—with direction to deposit it in the defendant bank, which was done, and the amount, \$4,000, duly placed to the credit of Whitney. Defendant immediately indorsed this draft as follows: "Pay Metropolitan National Bank, Chicago, or order, for collection, for account of the Bank of Commerce of Kansas City, Missouri. C. J. White, Cashier"—and sent it to the latter bank at Chicago. On the

morning of December 24 Whitney drew a check for \$4,500 on defendant, payable to Brown, which was at once presented by Brown, and paid, the proceeds being given to Whitney. At half past twelve that day Whitney disappeared from Kansas City, and was never afterward seen there. He told Brown he had been called by telegraph to Nevada, Mo., to buy stock, and wanted Brown to go down to Nevada on Christmas night or the next morning, giving him \$75 to pay his expenses and a week's salary. Brown went to Nevada on the morning of the 26th, and stayed all day, inquiring for Whitney, but, being unable to learn any thing about him, or who he was, he returned to Kansas City that night, it being Saturday night. He went to the office next morning, but found no one there. He went again Monday morning, December 28, and again finding no one, he went to the defendant, and inquired for him, but the officers of the bank knew nothing of him. He continued to go to the Whitney office for about a week. The draft of \$4,000 reached Chicago December 25, and on the next day — December 26 — it was presented to and paid through the clearing-house by the Northwestern National Bank (the plaintiff) to the Metropolitan National Bank, and the proceeds duly placed to the credit of defendant on the books of the Metropolitan National Bank. The items paid by plaintiff on the 26th through the Chicago clearing-house were one thousand four hundred and twenty-five in number, amounting to nearly \$442,000. Its average daily clearing was about \$300,000; while the entire amount paid daily through the clearing-house was about \$8,500,000. The clearings are made at 11 A. M., and the items are received by the bank as soon as the messenger can make the exchanges and get back, which takes about half an hour. The items cannot be examined at the clearing-house. This must be done by the bank, and such items as it is not desired to pay must be returned to the bank, sending them before 2 P. M. There is not time, under the rule, to make a critical examination of every item paid in this way. On December 26 plaintiff paid thirty-one other drafts of the Omaha bank. The \$4,000 was charged to this bank, and was sent to it in the regular course, with other vouchers, on January 4. On the 11th, said bank, by letter and wire, notified plaintiff of the forgery. The telegram was received too late, so that notice was not given the Metropolitan Bank until the next



day. Plaintiff, through that bank, at once gave notice to defendant. The forgery was a very dangerous one. The officers of the Omaha bank, as well as the clerk whose name was signed to the draft, at first thought it was genuine. They say it must have been lithographed on the original plate of their drafts. There was evidence showing that the channel through which a draft is presented for payment makes a difference with respect to the inspection; that in dealing with responsible parties their prudence and care is relied upon; that a draft paid through the clearing-house does not receive as close inspection as when presented over the counter by the payee. The evidence also tended to show that the letter of the cashier of the Nevada bank was a sufficient identification of Whitney to justify a prudent bank to deal with him in the ordinary course of business. Whitney was traced by detectives to New York, where it was ascertained he had been sent to the penitentiary for five years from Rochester in April, 1886, for forgery. It was learned his true name was David Lynch, but he was sent to the penitentiary under the name of George Edmonda. Whitney left \$550 to his credit in the defendant bank, of which the plaintiff received \$280, and the New York bank \$270. Upon these facts the plaintiff by this action seeks to recover from defendant the sum of \$3,720 and interest — the amount lost on the forged draft. The circuit court of Jackson county directed the jury to return a verdict for defendant, whereupon plaintiff took a nonsuit, with leave, etc. The court having refused to set aside this nonsuit, plaintiff appealed to this court.

Before proceeding to analyze the evidence to determine whether the court erred in forcing plaintiff to a nonsuit, we will take our legal bearings, and ascertain the principles of law we must apply to the facts in the case. The general rule is that the drawee of a bill of exchange or draft is bound to know the handwriting of his customer, the drawer; and, if he pays a bill or draft in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill or draft turns out to be a forgery. This rule was first announced by Lord Mansfield in *Price v. Neal*, 3 Burrows, 1354 (1762), and has been followed and approved by the English courts, and an overwhelming majority of the American courts, including the supreme court of the United States and of this state. *U. S. Nat. Bank v. National Park Bank* (Sup.), 13 N. Y. Supp. 411;

Stout v. Benoist, 39 Mo. 277; Bank v. Yost (Sup.), 11 N. Y. Supp. 862; 4 Harv. Law Rev. 297, and cases cited. See 3 Amer. & Eng. Enc. Law, 222, where the English and American authorities are collated. It is also well settled that an indorsement of a draft for collection limits the effect which would have been given to a general or blank indorsement, and warns parties dealing with it that there is no intent to transfer the ownership or proceeds of the draft. Mechanics' Bank v. Valley Packing Co., 70 Mo. 643; 4 Mo. App. 200, and cases cited.

With these legal principles for our guide let us see if the defendant was a *bona fide* holder for value of the draft of \$4,000 at the time the plaintiff paid it. If it was, the loss must fall on the latter. It is conceded, defendant paid full value for this draft, but plaintiff's contention is that it is not a *bona fide* holder of the draft, because it was not prudent in its dealings with Whitney in failing to inquire more particularly who he was. Defendant's conduct must be judged from the standpoint it occupied during these transactions, and from the circumstances as they presented themselves to it at that time. We know much now that the officers of the bank did not know then. We know that the true name of the man calling himself Whitney was David Lynch. This the bank officers did not know. We know that Whitney's office was substantially unfurnished. This the bank officers did not know. We know that Whitney was a criminal, and that the drafts he deposited were forgeries. This the bank officers did not know. But the evidence shows that Whitney and Brown were strangers to the bank officers. Whitney brought a letter of introduction from the cashier of the Nevada bank, showing his genuine signature. He went to the defendant, presented this letter, and a certificate of deposit for \$350, given by the Nevada bank. He drew \$50 cash and left \$300 of this certificate on deposit with defendant. He was neatly dressed, and had the appearance of an ordinary business man. He did nothing, said nothing, to attract attention. When he left on December 24, he had a deposit with defendant of \$550, which he never drew out. The evidence all shows that the letter of the cashier of the Nevada bank was a sufficient identification of Whitney to justify defendant in dealing with him in the customary way, and there is no question that the defendant cashed Whitney's drafts as drafts

are usually cashed in the ordinary course of business. The drafts handled by Whitney were so well executed on the blanks of the Omaha bank that the officers of this bank first thought they were genuine. We find nothing in this record to show that defendant's officers knew any thing or saw any thing to arouse their suspicions as to Whitney, or to cause them to make further inquiry in regard to him. If they had followed him to his office, and had seen his surroundings there, they might have learned enough to put them on further inquiry, but it can scarcely be expected that bank officers shall act as spies upon their customers. Brown knew the office surroundings, but he was thrown completely off his guard by the statement of Whitney that furniture had been ordered from Chicago; and, besides that, Brown did not communicate to the bank the condition of the office. Brown's trip to Nevada shows conclusively how completely he was deceived. Whitney was beyond question an old offender. His plan of operations was well contrived and admirably executed, and calculated to throw the best business men off their guard. The chances of being defrauded by a forgery are slight. Yet bankers are in the habit of requiring identification, and, indeed, they must, at their peril, require the identification of those dealing with them. But when a person is identified by a responsible party, this requirement is fulfilled.

Our conclusion is that the defendant became the *bona fide* owner of the forged draft, for value, in the ordinary and usual course of business. Let us next inquire whether it was the holder of this draft at the time it was paid by plaintiff, on December 26, 1885. If the principle of law we have announced above, that an indorsement of a draft, "For collection," does not transfer the ownership or proceeds thereof, be correct, this branch of the case will require but little discussion. This draft was indorsed by defendant, "For collection," and when the Metropolitan National Bank presented it to plaintiff for payment it presented it as the agent of defendant, and plaintiff was bound to know this by the very form of the indorsement itself. The plaintiff knew, when it paid the draft, that the proceeds were to go to defendant. Hence it cannot now say that it thought the defendant had negotiated the draft, parted with the title to it with the intent to give it currency as negotiable paper. Defendant's indorsement destroyed the negotiability of the draft. *Mechanics' Bank v. Valley Packing Co.*, supra. The

form of the defendant's indorsement distinguishes this case from a number of cases, of which *Bank v. Bangs*, 106 Mass. 444, is a type, where third persons take drafts and give them currency by indorsing them in blank. Defendant, by its indorsement in this case, warned plaintiff that it was not intended to transfer the ownership of the draft or its proceeds, and hence the defendant did not guaranty the genuineness of the signature of the drawer but it did guaranty that the payee's signature was genuine; and it was genuine. It is true, the payee's real name was not Whitney, but the payee of the draft was in fact the person who went by the name of Whitney, and this person did in fact indorse the note, — i. e., this draft was not payable to one person and indorsed by another, but was payable to and indorsed by the same person. If, therefore, plaintiff paid the draft more readily, and with less investigation and inquiry, because a reputable bank presented it for payment, than it would have otherwise done, it will nevertheless have to bear the loss. The defendant owed plaintiff no duty. It simply presented for payment a draft purporting to be drawn by the Omaha bank, and it was the duty of plaintiff to know, before paying it, that it was in fact made by the party who appeared to be the drawer, and, having failed to perform this duty, it cannot be heard to complain. Here are two innocent parties, upon one of which this loss must fall. The argument that defendant's conduct in taking the draft was not induced or controlled or affected by plaintiff should have no influence in the determination of questions growing out of commercial transactions of the character involved in this controversy. The business of the world is transacted now almost wholly through banks and banking institutions by checks, drafts and bills of exchange. This system could not last a day unless there be fixed and determinate rules by which business men can certainly know their liability or non-liability. It is true, if plaintiff had refused to pay this draft when presented, the loss would have fallen, and certainly fallen on defendant, for Whitney was gone before the draft was paid in Chicago, though defendant knew it not. But we cannot lay down rules to meet exceptional cases. Many cases may arise in which a remedy would exist against the wrong-doer, if applied promptly. When the defendant sent this draft to Chicago, and it was paid, it had as much right to assume that its liability to loss had ceased as if it had in-

dorsed it in blank, and it was not protested in the proper time for non-payment. Any other rule would put the commercial world at sea. We need not inquire now whether the rule we lay down be the best or not. We find it to exist, and that it has existed since 1762. It may, like all general rules, work occasional hardships, but considerations of convenience and public policy imperatively demand that it be not changed to do what the judge may deem equitable in a given case. The best interests of the commercial world require stability and fixedness in commercial law. We think it clear that plaintiff, upon the pleadings and evidence in this case, is not entitled to recover, and the judgment of the circuit court is accordingly affirmed.\*

All concur.

**Banks and banking — forged checks.**— The case of *Deposit Bank v. Fayette National Bank*, 2 Am. R. R. & Corp. Rep. 296, is very similar to the foregoing, and supports the same views as to liability of the respective parties in interest.

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### DEMAREST V. FLACK ET AL.

(Court of Appeals of New York, Oct. 6, 1891.)

1. FOREIGN CORPORATIONS. SUIT AGAINST DEFENDANTS AS INDIVIDUALS. DEFENSE OF INCORPORATION. PLEADING. In an action against the defendants as a joint-stock company, they denied that they were such a company, and claimed to be members of and stockholders in an incorporated company, by which the liability, if any, to plaintiff, was to be borne. Held, that such defense was available, although the fact of such incorporation was not pleaded, as the defense tended to show that there never was any liability on their part.

2. FORMATION OF CORPORATION. EVIDENCE OF USER. Under a certificate of incorporation duly issued to five corporators, one of them acted as president of the company, although it did not appear how or when he was elected. Another acted as its treasurer, and kept a check-book, and made disbursements for the company by check, and received and put in bank what money came to it. He also had charge of the stock-book, though at the time he testified he did not know where it was. The president, vice-president, treasurer and one other stockholder were directors. One of the corporators testified that he had stock in the company, which he paid for, and that he refused to go into the business, unless under an incorporation. Held, that this was sufficient evidence of user to show an acceptance by the company of its charter.

3. FOREIGN CORPORATIONS. ELECTION OF UNQUALIFIED DIRECTORS. EFFECT UPON CORPORATE EXISTENCE. A certificate of incorporation was duly is-

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\* Reported in 17 S. W. Rep'r, 968.

sued to residents of New York by the secretary of state of West Virginia, pursuant to Code of West Virginia 1884, chapter 54, which provides that the corporators "shall, from the date of the said certificate, \* \* \* be a corporation," and also provides for the holding, subsequent to the issue of such certificate, of a general meeting of the stockholders to elect directors, make by-laws, etc., and permits the corporation to prescribe the qualifications of directors, but requires that, if it is not otherwise provided, every director must be a resident of the state of West Virginia. Held, that the election of directors who were not residents of West Virginia, although no by-law permitting it had been adopted, did not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises.

4. WHETHER AN INCORPORATION UNDER FOREIGN LAW IS INTENDED AS AN EVASION OF DOMESTIC LAWS, IS A QUESTION OF LAW FOR THE COURT. The question whether an incorporation under the laws of West Virginia, of residents of New York, for the purpose of doing business in the latter state, is invalid in that state as an attempted evasion of its laws, is a question of law for the court, and the question of evasion should not be submitted to a jury as matter of fact.

5. VALIDITY OF AN INCORPORATION OF RESIDENTS OF NEW YORK UNDER LAWS OF WEST VIRGINIA TO DO BUSINESS IN THE FORMER STATE. The laws of West Virginia, under which a certificate of incorporation was issued to residents of New York to do business in the latter state, made it the duty of the secretary of state, before issuing such a certificate of incorporation, to decide whether the application therefor conformed to the laws of West Virginia, and also made the certificate evidence of the existence of the corporation. The laws of New York also permitted the incorporation of individuals for the purpose of doing the business contemplated, and under those laws the freedom from personal liability would be as great and as easily attained, and the security of creditors would not be substantially greater in the case of a domestic as of a foreign corporation. Held, that such incorporation was not invalid, as a fraud or evasion of the laws either of West Virginia or of New York, as the policy of West Virginia plainly favored the formation under its laws of corporations composed of non-residents, the principal business of which was to be performed outside of the state; and the policy of New York in recognizing foreign corporations formed for the purpose of doing business in that state was not violated even where such a corporation was composed of citizens of the state.

**A** PPEAL from common pleas of New York city and county, general term. Action by Frances E. Demarest, an infant, by her guardian, etc., against Hugh J. Grant, James A. Flack, Alfred de Cordova, Frank Hardy and Gabriel Case, composing the America's Winter Carnival Company. At the trial the complaint was dismissed, and plaintiff's exceptions were ordered to be heard in the first instance at the general term, which overruled the exceptions, and ordered judgment for defendants. From the judg-

ment plaintiff appealed. The Code of West Virginia, chapter 54, section 10, provides that, "when a certificate of incorporation shall be issued by the secretary of state pursuant to this chapter, the incorporators named in the agreement recited therein, and who have signed the same, and their successors and assigns, shall from the date of the said certificate until the time designated in the said agreement for the expiration thereof, unless sooner dissolved according to the law, be a corporation by the name and for the purposes therein specified.

*Seaman Miller* for appellant. *Wales F. Severance* for respondents.

PROCKHAM, J. The plaintiff alleged in her complaint that the defendants were a joint-stock company doing business in New York city under the name and style of "America's Winter Carnival Company." It was further alleged that they were the owners of the toboggan slides used at Fleetwood park, in the city of New York, and that such slides were under their management and control. The plaintiff also alleged that she had, while riding on one of the toboggans upon one of the slides in the possession and management of defendants, been accidentally and seriously injured through the carelessness of the defendants or their employees, and she demanded judgment for \$25,000 damages. The defendants, by answer denied that they were a joint-stock company, and also denied the allegations that they were the owners of the toboggan slides mentioned, or that they were under their control; and they denied all allegations of negligence, either on their own part or on that of any of their employees. Upon the trial the plaintiff gave no evidence as to the defendants being a joint-stock association, but endeavored to prove a joint or partnership liability of defendants, based upon the allegation that the grounds where the accident occurred were owned by the New York Driving Club, and that in the fall of 1887 the grounds were leased by it to the defendants for the purpose of putting up these toboggan slides. The evidence tending to show even a *prima facie* liability on the part of the defendants is of the most meager character. We will assume, however, that the plaintiff proved enough to call upon the defendants for an answer to her cause of action. This

answer was, in brief, that the defendants were nothing but individual members of and stockholders in an incorporated company which had hired the grounds, owned the toboggans and operated the slides; and that whatever liability there was, if any, in favor of the plaintiff, was borne by the incorporated company, and not by the individual stockholders therein. To prove this defense the counsel for defendants offered in evidence a certificate of incorporation of the America's Winter Carnival Company, as organized under the laws of West Virginia, and at the same time he offered the Code of West Virginia in evidence. The certificate and the Code were objected to by the plaintiff's counsel on the ground that there was no allegation in the answer of the existence of a corporation or the incorporation of the America's Winter Carnival Company, and that it was necessary to plead such fact before the defendants could avail themselves of the defense. The certificate was further objected to as incompetent, immaterial and illegal. The objections were overruled, and plaintiff's counsel duly excepted.

The first ground of objection, as to the necessity of pleading the defense founded on the incorporation, was properly overruled. It was not a defense necessary to be pleaded. It went to the root of the cause of action, and tended to show there never had been any liability on the part of the defendants. It was not an affirmative defense which in substance admitted an original cause of action, but showed facts which operated as a satisfaction thereof. It was not like a defense of payment, or a release, or an accord and satisfaction. If operative, it showed there had never been any liability; and hence it was admissible under the defendant's denial of any liability as set out in the complaint. The certificate, when read in evidence, showed that it was signed by the secretary of state of West Virginia, and that it was issued under the great seal of that state, and in it the secretary declared that the incorporators therein named, and their successors and assigns, were from the 12th day of December, 1887, until the 1st day of January, 1935, a corporation by the name and for the purpose set forth in the certificate. It was subsequently proved, under objection and exception, that this company was at the time of the happening of the accident in possession of the toboggan slide in question, and was the owner thereof.

As to the second ground of objection taken by plaintiff's coun-



sel to the introduction of the certificate—that it was incompetent, immaterial and illegal — we may assume that it raises the question of the validity of the incorporation itself, and of its sufficiency as a defense. Upon this issue a few additional facts must be stated. The Code of West Virginia, which was received in evidence, shows that a corporation of the kind herein spoken of could be formed under the general laws of that state by five or more persons signing an agreement to the effect stated in the statute, and by the payment by each corporator of at least ten per cent of the par value of the stock subscribed for by him. Affidavits on the part of at least two of the corporators, stating necessary facts, were also required by the statute. It is further therein provided that the agreement, acknowledgment and affidavits are to be delivered to the secretary of state, and he issues to the corporators his certificate, under the great seal of the state, declaring, among other things, that they and their successors and assigns are a corporation from that date until a time therein specified. The effect of the certificate is provided for by the statute, which says that the corporators and their successors and assigns shall, from the date of the certificate until the time designated therein, be a corporation, and the certificate shall be received as evidence of such incorporation. The statute provides for the holding of meetings of the corporation, including the first general meeting for purposes of organization, out of the state, and it also provides for keeping the principal office of the corporation in any state or territory of the United States, and it permits the corporation to adopt by-laws, and to prescribe the qualifications of directors, and, if it be not otherwise provided, every director must be a stockholder and a resident of the state of West Virginia. The certificate in question in this case embodies an agreement among five corporators, by which they agree to become a corporation by the name of “America’s Winter Carnival Company,” for the purpose of leasing premises for amusements—among others, for toboggan slides; and they agree that its principal office shall be in the city of New York; and in this agreement they recite that they have subscribed a certain sum (named therein) to the capital of the company, and have paid ten per cent thereof, and that the capital so subscribed was divided into shares of \$100 each, which were held by them. The names

of the corporators were signed to the agreement, and their residences were therein stated as being in the city of New York. The agreement, properly signed and acknowledged, was presented to the secretary of state of West Virginia, and a certificate of incorporation duly issued, as already stated. From the evidence it is clear, upon the question of user, that there was a person who acted as president of this company under a so-called election, although it does not appear how or when he was elected. That person was a resident of New York. There was also a person who acted as treasurer of the company, and he also resided in New York. The treasurer kept a check-book, and made disbursements for the company by check, and received what money came to it, and put it in the bank. There were no by-laws. The treasurer once had charge of the stock-book of the company, though at the time when he was sworn on the trial he did not know where it was, and he supposed the company was not then in existence. Admission to the grounds occupied and possessed by this company was charged, and the money that was paid for admission to the toboggan slides went through the treasurer's hands. No one could get in without paying toll, excepting members of the driving club. The president and vice-president were directors, as was also the treasurer and one other stockholder. This company was in possession of the toboggan slides when the accident occurred, "and no other concern or individuals or anybody else." The defendant Grant said he had stock in the company, which he paid for, and that he refused to go into the business at all unless under an incorporation. The books of the company were not produced, and it did not appear what, if any, books had been kept by it, other than the stock and check-books spoken of by the treasurer.

This is substantially all that appears in regard to user by the corporation; and the counsel for plaintiff, upon this evidence, moved to strike out the certificate of incorporation, and all the testimony relating thereto, on the ground "that the directors of the concern were residents of New York, and that under the statute of West Virginia it was necessary, in order that the corporation be duly incorporated, that the directors of the concern should be residents of West Virginia, unless a special resolution were passed by the corporation permitting persons of any other

state to be such directors." The motion was denied; and, thereupon, on motion of counsel for defendants, the complaint was dismissed because no cause of action was proved against the defendants personally. There was sufficient evidence of user to make it clear that the company had accepted its charter, with all its privileges and liabilities, whatever they might be. This question of user, although not specifically taken in the above objections, has been urged upon us here by the counsel for the appellant, and we think it well enough to say what we have upon the subject. As to the other points which have been actually raised by the motion to strike out the certificate, we think a proper disposition was made of them by the court below.

By the statute of West Virginia the incorporation precedes the election of directors. After the incorporation, and subsequent to the issuing of the certificate thereof by the secretary of state, the incorporators named therein, or a majority of them, are directed by statute to appoint a time and place for holding a general meeting of the stockholders to elect directors, make by-laws and transact other business. A failure to adopt a by-law at the first meeting permitting the election of non-resident directors, and the election of non-resident directors at such meeting or at a subsequent one, in the absence of a by-law permitting it, would not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises. The company would still remain a legal entity, notwithstanding its failure to adopt the proper by-law, or, in its absence, to elect resident directors. The counsel for plaintiff was, therefore, in error in his statement as to the law of West Virginia.

We come, then, to the question whether upon the facts already set out, this corporation was so far valid as to be entitled to recognition as such in the courts of our state. The plaintiff says it clearly appears that the incorporators thereof were citizens of New York, and the corporation was formed by them in the state of West Virginia for the sole purpose of doing business out of that state and in the state of New York, in which latter state its principal office was also to be located. These facts, he says, conclusively prove the invalidity of the West Virginia corporation, so far at least as this state and its citizens are concerned. If mistaken in that view, he still urges that such facts render it a question for the determination of the jury whether the incorporation

was attempted to be made in good faith, or as a mere evasion and in fraud of the laws of West Virginia or of New York. He claims, if the jury should find the purpose was one of evasion, that in such case the incorporation would furnish no defense, and the defendants would be liable as individuals. We are quite clear the case should not be submitted to a jury to pass upon the question of evasion as matter of fact. If it were, we might find different juries coming to different conclusions upon the same facts, and we should have a corporation or no corporation according to the view a jury might take of such facts. One plaintiff might prove the evasion to the satisfaction of one jury, and another plaintiff fail on precisely the same facts; and thus we should have a corporation as to A., and no corporation as to B., and the same question constantly arising as often as the corporation or its members were sued. This would be intolerable. It must be a corporation as to all persons with whom it has business dealings, or as to none. In other words, it must be a question of law, instead of fact.

The courts of any country recognize foreign corporations through what is termed "national or state comity" (*Merrick v. Van Santvoord*, 34 N. Y. 208; *Bank v. Earle*, 13 Pet. 519; *Christian Union v. Yount*, 101 U. S. 352); but whether such recognition shall be given must be decided by the courts of the country where the corporation seeks to do business. In our state, as in others, it is a question of domestic policy and what that policy is must be determined by an examination of our own legislation. If we find any direct enactment upon the subject, it is our duty to obey it; and in its absence we must determine the question with reference to our general legislation, and to the circumstances which surround us as a great and growing commercial community, having need of and employing large amounts of combined capital, and for whose prosperity and growth it is of the utmost importance that such capital should have the greatest facilities extended it for useful employment, with reasonable and proper personal exemptions from liability. We can find no reason for a domestic policy that should exclude from recognition by our courts foreign corporations generally. It may be safely said there can be no such domestic policy at the present day in a civilized state. The question then arises, shall we go behind the certificate of incorpo-

ration or charter of a foreign corporation for the purpose of inquiring under what circumstances, and for what purpose outside the charter, it was incorporated? This can only be claimed on the ground that the charter was obtained in fraud or evasion of the laws of the state which granted it, or for the purpose of evading the provisions of our own laws. It is plain there was in regard to the procurement of this charter no fraud upon or evasion of the laws of West Virginia, even if we should admit that such fact would constitute good ground for our refusal to recognize such corporation, although no proceedings have been taken to annul its charter in the state which granted it. This point is by no means clear. However that may be, it is impossible not to see that the state of West Virginia has adopted a policy which favors the formation of corporations within her borders, and pursuant to her laws, while the members and officers may be non-residents, and where the principal business of the corporation is to be performed outside of the confines of the state.

The agreement which was signed by the incorporators in this case, and duly acknowledged and presented to the secretary of state of West Virginia, clearly showed that the incorporators were residents of New York, and that the principal office of the corporation was to be in New York; and the inference was a fair one that the principal business of the corporation was also to be conducted in New York. The secretary of state, to whom the papers for the organization of the corporation were presented, was compelled to pass upon and decide the question whether they conformed to the laws of West Virginia, before he received or filed them, or gave the certificate of incorporation. He did pass upon the question and did thereupon issue the certificate of incorporation under the great seal of the state, and attested by his official signature. So far as the laws of West Virginia are concerned, it is plain that the incorporators thereupon became a corporation, and in that state the certificate was, by the laws thereof, evidence of the existence of such corporation. There was no fraud or evasion of the law of West Virginia, in thus becoming incorporated. The references to her laws above made show conclusively that the formation of corporations thus composed, and for the purpose of doing their principal business outside the limits of that state, was contemplated in those laws. This corporation was beyond all ques-

tion legally incorporated, and entitled to recognition, in the state of West Virginia. Unless, therefore, it can be said that the acts of our citizens in procuring an incorporation under the laws of West Virginia for the purpose of doing business here were, as matter of law, a fraud and an evasion of our own laws, and hence in conflict or inconsistent with our domestic policy, such foreign corporation is entitled to recognition and protection in our own tribunals. *Merrick v. Van Santvoord*, *supra*. It is urged that such acts are thus inconsistent and in conflict with our policy, because citizens of our own state are in that way enabled to evade our own laws relative to home corporations, and to avoid personal liability by incorporating under the laws of foreign states, which may be more favorable to members than are our own laws. I think, when this claim is examined in the light of our own legislation, it will be seen that there is no substantial basis for it to rest upon. An examination of our laws shows that it is, and for many years has been, the policy of this state to enlarge the facilities for the formation of corporations. General laws are on our statute-book for the formation of corporations of almost every conceivable kind, and under some one of them a corporation of the kind mentioned in this case could readily be formed. The freedom from personal liability would be as great, and could be as easily obtained, under our own as under the laws of West Virginia. The security of the creditor would not be substantially greater in the case of the domestic than in that of the foreign corporation. In the latter the creditor has the remedy by attachment, and he can obtain about as easy access to its property as if it were domestic instead of foreign. There is really nothing to evade by incorporating under a foreign law. No harmful results flow to a creditor or to the community here by such incorporation. Where the corporation formed under another jurisdiction comes here to do business of a kind which we permit to be done by corporations, and where our laws provide for incorporating individuals for the purpose of doing that business, it is difficult to see how the terms "evasion" and "fraud" can be properly applied to acts of our citizens whereby they obtain incorporation in another state. When they come into our state to do business, they must conform to our laws relating to foreign corporations, and comply with the terms laid down by us as con-

ditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws; and, if there be any kind where none is imposed, it is conclusive evidence that up to this time the legislature has not thought it conducive to the true interests of the state and its citizens to impose them. I do not intimate that it is necessary for a state to expressly, by statute, exclude foreign corporations from acting within its jurisdiction. The policy of the state may exclude them, and that policy may be clearly established by a reference to the general legislation of a state. I find none such in the laws of this state.

It has been urged that the easy way which our laws provide for forming corporations is itself a reason why we should not recognize as a corporation those of our own citizens who have gone to another state for the purpose of incorporating themselves under the laws thereof, to do business in our own state as such corporation. We think there is very little force in the argument. The public policy which we see in our own state, as evidenced by her laws upon the subject of the formation of corporations, is one which looks to their ready and easy formation as a means of transacting business with an accumulation of capital, and an exemption from personal liability to the largest extent consistent with reasonable supervision by the state. The facilities for incorporation offered by this state are not the result of any desire to promote the formation of corporations here as against their formation in other states. They are offered because of a policy on our part which urges upon the state the propriety of furnishing them as one means of controlling the business done by them and keeping it within our borders. If, in any particular case, it is thought by those interested in the matter that the business can be done in our own state and by our own citizens with greater facility under the form of a foreign corporation than under that of a domestic one, there is no public policy which forbids its transaction under such form. The supervision of a foreign corporation by this state may easily be exercised by imposing terms as a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the legislature to say whether any, and, if so, what, terms shall be imposed upon

such corporations as a condition of granting them permission to do business here. Those terms can only be imposed by the legislature; and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this state and do business here. The courts cannot themselves impose terms or conditions.

The case of *Montgomery v. Forbes*, 148 Mass. 249; 19 N. E. Rep'r, 342, is not necessarily in conflict with these views. In that case, the defendant, a resident of Massachusetts, went to New Hampshire, and there executed and filed certain papers, for the purpose of forming a corporation in that state, for the reason that its tax-laws were more favorable than those of Massachusetts, and because he desired to avoid personal responsibility. The whole business was to continue to be done in Massachusetts, and these steps were taken in order to avoid the laws of that state. The court held that the defendant had not complied with the terms of the New Hampshire act, and hence had never become incorporated. There was no tribunal in New Hampshire to which the papers in regard to a proposed corporation could be submitted, and which had power to decide whether the law had been complied with, and, upon compliance, to issue a certificate of incorporation. But all persons filed their papers at their peril. If the question ever arose as to a compliance with the law, it had to be decided by comparing the papers with the statute. The Massachusetts court did that, and decided that the defendant did not comply with the New Hampshire statute, and that no corporation had ever been formed. In *Hill v. Beach*, 12 N. J. Eq. 31, the court of chancery of New Jersey, in a proceeding for an accounting, said that certain persons who had entered into an agreement with a view to form a company to do business in New Jersey, and who thereupon undertook to form themselves into a corporation under the general act of this state relative to the formation of manufacturing corporations, passed in 1848, and who complied with the forms of such act, would nevertheless not be recognized by the courts of New Jersey as a legally constituted corporation. The chancellor said they were not a foreign corporation, "for it is perfectly manifest upon the face of their proceed-



ings that their attempted organization under the general law of New York respecting corporations was a fraud upon the laws of that state." In what respect it was a fraud does not appear, unless it were one because the corporators were residents of New Jersey, and intended to do business in that state under the New York incorporation. From what has already been said, we do not think those facts make out a case for a refusal to recognize a corporation legally constituted and existing in the foreign state.

We recognize corporations formed by the citizens of a foreign state under its laws for the purpose of doing business, among other places, in our own state. Where is the essential difference between such a corporation and one legally incorporated under such foreign state for the same purpose, but the members of which are citizens of our own state? Whose rights are jeopardized more in the case where the members of the corporation are our own citizens than where they are citizens of the foreign state? What enlightened policy is violated by the recognition of the foreign corporation composed of residents of this state which would not also and equally suffer by the recognition thereof when composed of non-residents? And yet, beyond all cavil, our policy is to recognize the latter. The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst. They carry no black flag, and the policy of all civilized nations is to grant them recognition in their courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our state, and composed of citizens of the foreign state, is equally potent when the foreign corporation is composed of our own citizens. It has always been supposed that a state should at least deal as liberally with its own citizens as with those of foreign states. If, therefore, we permit foreign citizens to come within our limits in the form of a foreign corporation organized with power to do business here, and recognized by us, why should we not permit our own citizens to avail themselves of the like privilege? If we impose terms and conditions upon foreign corporations, as such, doing business here, those same terms and conditions still and equally apply to a foreign corporation when composed of our own citizens. Why should they not be placed at least upon an equality with the foreign citizen?

The case of *Railway, etc., Co. v. Board*, 6 Kans. 245, simply holds that the courts of that state will not recognize a corporation formed under the laws of Pennsylvania, where the corporation is not itself permitted to do business in the state which grants its charter. It was also stated in the above case that the charter, if enacted by the Kansas legislature, would have been void as contravening two constitutional provisions. In such a case it would scarcely be expected that a foreign state would grant greater recognition and privileges than were accorded by the state under which the corporation was formed. It might readily be supposed that no rule of comity compelled the recognition of a foreign corporation formed to do acts which are prohibited by the laws of the state to its own citizens or corporations. It is upon this principle that *Empire Mills v. Alston Grocery Co.* was decided by the court of appeals of Texas, and reported in 15 S. W. Rep'r, 200, 505, and to which our attention has been called. The legislature of Texas prohibited the operation of corporations in that state of the character of the Iowa corporation, and the court held that comity did not extend to the recognition of such a corporation by the courts of Texas.

After a careful examination of the case, we have come to the conclusion that the defendants sufficiently proved the existence of a valid corporation under the laws of West Virginia, and that there was nothing in the other facts proved which should cause us to refuse recognition to that corporation. The result is that the complaint was properly dismissed, and the judgment to that effect should be affirmed, with costs. All concur, except Finch, J., absent.\*

#### FOREIGN CORPORATIONS — RIGHTS BY COMITY.

1. *Capacity of a corporation to exercise its powers in a foreign state.*—A corporation created by one state, in so far as its own inherent capacity is concerned, and in the absence of any restriction in the law of its creation, may do business and perform corporate acts in any other state in which it may choose to do so, if permitted by such other state. *Bank of Augusta v. Earle*, 13 Pet. 519; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 489; *Dodge v. Council Bluffs*, 57 Iowa, 560; *Atchison, etc., R. Co. v. Fletcher*, 85 Kans. 286; *Miller v. Ewer*, 27 Mo. 509; *Baltimore & Ohio R. Co. v. Glenn*, 28 Md. 287; *Williams v. Creswell*, 51 Miss. 817; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Hanna v. International Petroleum Co.*, 23

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\*Reported in 28 N. E. Rep'r, 646; 128 N. Y. 205.

Ohio St. 622; *Second National Bank v. Hall*, 35 Ohio St. 158; *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. 1; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep'r, 73; 1 Mor. Corp., §§ 359-361. The power to operate in a state other than the one creating it, need not be expressly conferred upon a corporation by its organic law. *Dodge v. Council Bluffs*, 57 Iowa, 560. Such power will be implied in the case of every corporation, unless there is something in its charter or organic law which expressly, or by necessary implication, forbids its exercise. In the case last cited, the question arose whether a corporation created under the laws of New York for the purpose of supplying water to municipalities, could exercise its powers in Iowa, or whether it was limited to cities in the former state. The court held that, as the laws of New York had imposed no limitations upon the field of its operations, the courts of Iowa could not, and a contract between the company and the city of Council Bluffs, for constructing water-works and supplying water to the city, was upheld.

The acts which a corporation may do in a foreign state, must be within the general scope of its powers. It cannot do in a foreign state what it cannot do at home. *Diamond Match Co. v. Powers*, 51 Mich. 145; *Starkweather v. Am. Bible Society*, 72 Ill. 50. "And it may be safely assumed," says the court in *Bank of Augusta v. Earle*, 13 Pet. 519, 587, "that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and these acts must also be done by such officers or agents, and in such manner, as the charter authorizes." See, also, 2 Mor. Priv. Corp., § 963, and authorities cited.

Furthermore, a corporation can only do in a foreign state such acts within the line of its corporate powers as an individual might do. It cannot do acts which require authority from the sovereign power, though it might do such acts in the state of its creation. Accordingly, a corporation cannot exercise the power of eminent domain in a foreign state, though it may do so in the state of its creation, and though there be no express prohibition in the foreign state. *Holbert v. St. Louis, etc., R. Co.*, 45 Iowa, 23. The power must be expressly conferred by the state in which it is proposed to be exercised. *Lewis Em. Dom.*, § 242.

2. *Right of foreign corporation to do business in a state.*—It is the settled law that a corporation, created by the laws of one state, has no absolute right to do business in any other state. A state may exclude foreign corporations altogether or admit them upon such terms and conditions as it sees fit. It may admit them to the full exercise of their powers, or restrict them to the exercise of particular powers, or confine their operations to certain localities. These principles are decided by numerous authorities, among which may be cited the following: *Lafayette Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 586; *Doyle v. Continental Ins. Co.*, 94 U. S. 585; *St. Clair v. Cox*, 106 U. S. 350; *Philadelphia Fire Assn. v. New York*, 119 U. S. 110; *Fritts v. Palmer*, 132 U. S. 283; *Horn Silver Min. Co. v. New York*, 143 U. S. 305; 12 Sup. Ct. Rep'r, 408; *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145; 9 So. Rep'r, 136; *Utley v. Clark-Gardner Lode Min. Co.*, 4 Col. 369; *People v. Thurber*, 13 Ill. 554; *Firemen's Benevolent Assn. v. Lounsbury*, 21 Ill. 511; *Ducat v. Chicago*, 48 Ill. 172; *Cincinnati Mut. Health Ass. Co. v. Rosenthal*, 55 Ill.

85; *Carroll v. East St. Louis*, 67 Ill. 568; *Western Union Tel. Co. v. Lieb*, 76 Ill. 172; *Farmers & Merchants' Ins. Co. v. Harrah*, 47 Ind. 286; *Commonwealth v. Milton*, 12 B. Monr. 212; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *State v. Foadick*, 21 La. Ann. 434; *Attorney-General v. Bay State Min. Co.*, 99 Mass. 148; *Glens Falls Ins. Co. v. Judge of Jackson Circuit Court*, 21 Mich. 579; *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Howard*, 50 Mich. 239; *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485; *People v. Fire Assn. of Philadelphia*, 92 N. Y. 81; S. C., 119 U. S. 110; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Thorne v. Travellers' Ins. Co.*, 80 Penn. St. 15; *Fire Department v. Helfenstein*, 16 Wis. 186.

Corporations are not citizens within that provision of the federal constitution which declares "that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." This question is particularly discussed in the leading case of *Paul v. Virginia*, 8 Wall. 168. See, also, the cases above cited.

The general doctrines above stated are subject to certain qualifications. In the first place the general doctrine that a state may exclude foreign corporations at its pleasure, is subject to two exceptions which are thus stated in a recent decision of the supreme court of the United States. "This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest. Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than a half century ago in *Bank v. Earle*, 18 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 12. The other limitation on the power of the state is where the corporation is in the employ of the general government—an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton v. Railroad Co.*, 32 Fed. Rep'r, 9, 14. As that learned justice said, 'If congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union.' And this court, in citing this passage, added, 'without the permission and against the prohibition of the state.' *Mining Co. v. Pennsylvania*, 125 U. S. 181, 186; 8 Sup. Ct. Rep'r, 737." *Horn Silver Min. Co. v. New York*, 143 U. S. 305; 12 Sup. Ct. Rep'r, 403.

No case has arisen involving the right of a state to exclude a foreign corporation in the employ of the general government. In *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, it appeared that the state of Florida created the *Pensacola Company* and granted it the sole and exclusive privilege of erecting and maintaining lines of electric telegraph in certain counties in the state. The *Western Union Company*, having accepted the provisions of the act of congress, approved July 24, 1866, and having acquired by contract the right to construct its lines along a railroad right of way within the counties in question, was proceeding to do so, when the former company sought to prevent it by injunction. The act of congress referred to, conferred upon any telegraph company, organized under the laws of any state, the right to construct, maintain and operate lines of telegraph over and along any military or

post roads of the United States, which have been, or may hereafter be, declared such by congress. All railroads had been declared by congress to be post roads. It was held that congress had power to pass the acts in question; that the Western Union Company was engaged in interstate commerce, and that the state of Florida could not exclude it from its territory.

The general doctrine that a state may impose such terms and conditions as it sees fit upon foreign corporations, as a condition of their doing business therein, is subject to the proviso that the conditions "are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." *Lafayette Ins. Co. v. French*, 18 How. 404, 407. These qualifications and exceptions to the general power of a state in regard to foreign corporations will be considered in a subsequent note.

3. *Rights of foreign corporations by virtue of comity between the states.* — While a state has power, with the exceptions noted, to exclude foreign corporations from its territory, no such intention will be implied. On the other hand, by virtue of the comity which obtains between sovereign states, foreign corporations are permitted to exercise their powers within a state, unless such exercise of powers is prohibited by positive law, or is contrary to the public policy of the state, or prejudicial to its interests. *Bank of Augusta v. Earle*, 13 Pet. 519; *Utley v. Clark-Gardner Lode Min. Co.*, 4 Col. 369; *Carroll v. City of East St. Louis*, 87 Ill. 568; *Ducat v. Chicago*, 43 Ill. 172; *Farmers & Merchants' Ins. Co. v. Harrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 531; *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. 1. And see the cases cited in section 1 of this note. In the case first cited, it is said in the opinion of the court:

"Every power, however, of the description of which we are speaking, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations, and between these states, the corporations of one state are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary laws of nations."

\* \* \* It has, however, been supposed that the rules of comity between foreign

nations do not apply to the states of this union; that they extend to one another no other rights than those which are given by the constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a state has adopted the comity of nations toward the other states, as a part of its jurisprudence, or that it acknowledges any rights but those which are secured by the constitution of the United States. The court think otherwise. The intimate union of these states, as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness toward one another, than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these states? They are sovereign states, and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted toward each other the laws of comity in their fullest extent. Money is frequently borrowed in one state by a corporation created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and so generally acquiesced in by the states, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another state." *Bank of Augusta v. Earle*, 13 Pet. 519, 589-591.

By virtue, therefore, of the comity which obtains between states and nations, foreign corporations are presumptively entitled to make contracts, acquire property and do business within a state in the line of their powers, and to bring and defend suits, and this presumption continues until the contrary affirmatively appears. *Christian Union v. Yount*, 101 U. S. 852; *Baltimore & Ohio R. Co. v. Glenn*, 28 Md. 287; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Miller v. Ewer*, 27 Me. 509; *Williams v. Creswell*, 51 Miss. 817; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *Second National Bank v. Hall*, 35 Ohio St. 158; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep'r, 73; *Cowell v. Springs Co.*, 100 U. S. 59. "In harmony with the general law of comity obtaining, among the states composing the Union, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest courts." *Christian Union v. Yount*, 101 U. S. 852, 856. See, also, 2 *Mor. Corp.*, § 961, and cases there cited.

4. The question of comity further considered—exclusion of foreign corporations on grounds of public policy.—In numerous cases already cited the rule is stated or implied that a foreign corporation will not be permitted to carry on business within a state, or to make contracts therein, when contrary to the public policy of the state. The public policy of a state in regard to any matter is to be ascertained by reference to the general course of legislation upon the subject. *Carroll v. East St. Louis*, 67 Ill. 568; *People v. Howard*, 50 Mich. 240.

All acts and contracts which are expressly or impliedly forbidden by statute would manifestly be invalid if done or made by a foreign corporation. Nor would foreign corporations be permitted to do acts or exercise powers which are forbidden to domestic corporations. Thus the laws of Illinois restricted domestic corporations in regard to the amount of real estate they might hold for the purposes for which it might be acquired, etc. It was held that a Connecticut corporation, organized solely for the purpose of buying, holding, selling and conveying land, without any limitations whatever, could not acquire or convey a valid title to land in Illinois. *Carroll v. East St. Louis*, 67 Ill. 568.

But acts of a foreign corporation done within a state, and otherwise valid, will not be deemed contrary to the policy of the state, simply because domestic corporations of like powers have not been created or provided for.

A statute of Illinois provided for the formation of corporations for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money. It was held that the statute did not indicate a policy that corporations should not be formed for the excepted purposes, or that the several kinds of business excepted should not be carried on by corporations, foreign or domestic. The court says: "It is not said, nor is it the reasonable implication, that the corporations excepted may not be formed under other acts. Indeed, the implication is directly the reverse, for the business of the excepted corporations, by the proper construction of the language employed, is called 'lawful,' and there can, in the absence of unmistakable language, be no presumption of exclusion of that which is 'lawful'—that is to say, which has the sanction or permission, and, consequently, entitled to the protection of the law. It is well answered by counsel for appellees: 'If this reasoning is correct, it would follow that the first section was also a declaration of the policy of the state that corporations should not be formed for any of the other excepted purposes, including insurance and the operations of railroads.' Yet there was, at that time, in force, and unaffected by that statute, a general law providing for the formation of insurance companies, and at the same session of the legislature at which that law was enacted, another law was also enacted for the formation of corporations for the operation of railroads. It is true that act provides for only certain corporations, and gives no right to incorporate for other purposes, and from this there may be an implication that the legislature would not grant the right to be incorporated for the excepted purposes, in the same manner, and subject to the same regulations and restrictions, but it is not, therefore, to be assumed that the legislature was unwilling to grant the right to be incorporated for the excepted purposes in another manner, and subject to other regulations and restrictions. From the different natures and purposes of the excepted corporations, reason exists why different and more stringent restrictions should be

thrown around them, but in such a country as ours, the public welfare demands that they be allowed to be created, under proper and wise safeguards, for the protection of the public, and not that they be absolutely prohibited.

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It cannot be said that the failure to provide for the organization of other corporations, by general laws, is an exclusion of foreign corporations of like character, unless it shall be held that the failure to enact such general laws is an evidence that they are opposed to our policy. But we have already said that from this failure there may be an implication that the legislature would not grant the right to be incorporated for the excepted purposes, in the same manner and subject to the same restrictions; but it is not, therefore, to be assumed that the legislature was unwilling to grant the right to be incorporated for the excepted purposes in another manner, and subject to other regulations and restrictions. The excepted purposes, banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money, we have, also, heretofore said are recognized by the general law as being 'lawful.' We know from their character, that they are not *malum in se*, and we know they have never become *malum prohibitum*, unqualifiedly, by any constitution or statute of this state, and our observation and experience teach us that under wise and wholesome restrictions and regulations they are important and beneficial, if not indispensable, factors in the general business welfare of the state. Whether they shall be allowed to be carried on by one individual or by many, by partnerships or corporations, is evidently purely a question of policy, and not a question of power or right in the government; and it may be asserted, without the fear of contradiction, that the policy of the state has been to allow banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money, either independently or in connection with or as incidental to other branches of business, by corporations—and this will hereafter be fully shown by reference to specific acts of the legislature. But corporations for these purposes, under our constitution, are private. The public does not become a stockholder in or owner of them, and so it is not the business of the legislature, of its own volition and unsolicited, in order to indicate its policy merely, to incorporate or provide for the incorporation of such companies. The power to provide for the corporation exists, but it is useless to exercise it unless there is a demand for it—in other words, if no persons desire to become incorporated for these purposes, no unfavorable inference can be drawn from the failure of the legislature to enact laws upon the subject. It is true, the reason a legislature fails to enact a general law providing for a particular class of incorporations may be because to do so would be opposed to its policy; but it may also fail to do so because there is no demand for such a law—either because the demand has heretofore been answered by special acts of incorporation, adopted prior to but continued in force by the present constitution, or because money in the state is scarce, and can be borrowed abroad, as is often the case, much cheaper than at home, or from both causes. It can hardly admit of debate, that, ordinarily, a demand for private charters, either through general or local and special laws, will not exist unless it is understood profitable returns can be made on money invested in business thereunder; and, whether such returns can be made, will usually depend on questions entirely disconnected from the disposition of the legisla-



ture to grant or withhold legislation for such charters. And so, it follows, mere absence of legislation authorizing the formation in the future, of a particular class or kind of corporations, cannot be accepted as conclusive evidence that it is against public policy to create such corporations." *Stevens v. Pratt*, 101 Ill. 306.

Another section of the act in question provided that "Foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions and duties that are, or may be, imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." "That sentence," says the court, "does not say that no foreign corporation, except those of like character as are provided to be formed under that act, shall be allowed to do business in this state. It does not assume to define what foreign corporations shall be allowed to do business in this state, but simply to impose regulations and restrictions upon certain named classes or kinds of foreign corporations doing business in this state—that is, those of like character as is provided may be formed under the general law." The decision was that nothing in the statute indicated any policy that foreign corporations engaged in the business of loaning money should not operate within the state. The prior decision of *United States Mortgage Co. v. Gross*, 93 Ill. 488, was expressly overruled.

A similar decision was made in *Cowell v. Springs Co.*, 100 U. S. 55. The suit was ejectment for land in Colorado and the plaintiff's title was derived through a deed from the National Land Improvement Company, a Pennsylvania corporation. The remaining facts and decision of the court appear from the following extract: "In March, 1872, the patentee conveyed the premises to the National Land Improvement Company of El Paso county, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise; construct houses and buildings; manufacture, trade and traffic; colonize, organize and form settlements; operate mineral and other lands, and improve and work the same, provided such lands be located in Utah, Arizona or adjoining states and territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the territory of Colorado, and to hold and convey real property there. By the law of March 2, 1867, then in force, the legislatures of the several territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing and other industrial pursuits. 14 Stat. 426. His position is that congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the territory. The answer to this position is found in the general comity, which, in the absence of positive direction to the contrary, obtains through the

states and territories of the United States, by which corporations created in one state or territory are permitted to carry on any lawful business in another state and territory, and to acquire, hold and transfer property there equally as individuals. If the policy of the state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several states before their legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one state are now engaged, without question, in business in states where the creation of corporations by special enactment is forbidden."

In *Empire Mills v. Alston Grocery Co.*, 15 S. W. Rep'r, 200, 505, it was decided by the court of appeals of Texas, among other things, that a foreign corporation could not carry on a mercantile business in Texas. The legislature had passed an act providing for the formation of such companies and had subsequently repealed it. This was held equivalent to a prohibition against the carrying on of a mercantile business by corporations within the state. The court says: "By an act of the legislature provision was made for the creation and operation of such companies. Rev. St. 1879, art. 566, subd. 27. This subdivision of said article was repealed by an act of the legislature in 1885. Acts 1885, p. 59. Said article 566 was amended again in 1887, but subdivision 27 was not re-enacted. This repeal of said subdivision 27 was an emphatic denial to all parties of the right to organize mercantile corporations in this state, and directly prohibitory of such corporations operating in Texas. The statute granted the privilege, and then revoked it. This superseded the rule of comity, and prohibited the foreign corporations. \* \* \* It would hardly be contended that, in repealing subdivision 27 of article 566 of the Revised Statutes, the legislature intended to exclude and debar the citizens of Texas from this field of corporation business, and leave it open to corporations from foreign states and nations under the rule of comity. Legislatures are not presumed to do unwise or foolish things, they are not presumed to legislate against the interests, rights and privileges of the citizens of their own states, nor are they presumed to intend to legislate adversely to the citizens of their own country and in favor of foreign corporations."

The laws of Illinois provide for insurance companies upon the stock plan and upon the mutual plan and no others. It was held that a foreign company organized upon a different plan was not entitled to a license to do business in the state. *Mutual Fire Ins. Co. v. Swigert*, 120 Ill. 36. See, also, *Isle Royal Land Corp. v. Osmun*, 76 Mich. 162.

It is a common thing for corporations to be organized to carry on business beyond the jurisdiction of the state creating them. The case to which this note is appended is a distinct recognition of the right of such corporations to operate in foreign states, under the general rules of comity. The same conclusion is supported by the case of *Cowell v. Springs Company*, 100 U. S. 59. In that case a Pennsylvania corporation was held entitled to do business in the territory of Colorado although it was incorporated to do business exclusively in the territory west of the Mississippi river. See, also, *Hanna v.*

International Petroleum Co., 23 Ohio St. 622; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343 Second National Bank v. Hall, 85 Ohio St. 158; Merrick v. Van Santvoord, 84 N. Y. 208.

In *Hill v. Beach*, 12 N. J. Eq. 81, the court declared that a corporation formed by citizens of New Jersey under the laws of New York for the purpose of doing business in New Jersey, was a fraud upon the laws of New York, and held the incorporators liable as partners. The decision is by the chancellor only.

Another decision opposed to the above doctrine is found in *Land Grant Ry., etc., Co. v. Comrs. of Coffey County*, 6 Kans. 245. According to the report the plaintiff was a Pennsylvania corporation authorized to do business anywhere except in the state of its creation. After having done business extensively in Kansas it commenced the suit in question to compel the defendant county to issue to it certain bonds which had been voted in its favor. Thereupon it was objected that the plaintiff had no right to do business in Kansas and no standing in court. This objection was sustained. The reasoning of the court is as follows: "A corporation, in order to have any legal or valid existence, must have a home, a domicile, a principal place of doing business, within the boundaries of the state which creates it. It may send agents into other states to do business, but it cannot migrate in a body. If it attempts to migrate in a body, to go beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements, and the persons who comprise it become only individuals, and even where a corporation has a legal and valid existence in its own state, the only recognition that other states will give to it is such as the rules of courtesy and comity between states require.

"Under the rules of comity, a foreign corporation may by its agents usually exercise in another state all the powers which it could exercise in its own state, which are not repugnant to the laws and institutions, nor prejudicial to the interests, of such other state. And comity would perhaps allow a foreign corporation to exercise in another state powers beyond which it could exercise in its own state, which were absolutely necessary to the exercise of its legitimate functions in its own state. For instance: Suppose that grapes and wine could not be produced in the state of Pennsylvania; and suppose that the state of Pennsylvania desired to charter a corporation to furnish grapes and wine from the states of New York and California to the people of the state of Pennsylvania. The states of New York and California might, through comity, allow said corporation to hold, occupy and operate vineyards in their respective states for that purpose. But this is certainly as far as any kind of courtesy or comity would go. No rule of comity will allow one state to spawn corporations and send them forth into other states to be nurtured and do business there, when said first-mentioned state will not allow them to do business within its own boundaries.

"The first section of the plaintiff's charter says that this corporation (the New York and California Vineyard Company) may do business any where *except in the state of Pennsylvania*, which is equivalent to saying that it shall not do business in the state of Pennsylvania; and the fourth section says, that it shall establish their offices *where their business is located*, which is equivalent to saying that they shall not establish any office in the state of Pennsylvania.

From the only territory in the whole world over which the state of Pennsylvania has any jurisdiction or control, and in which it could authorize a corporation to have an office, or to do business, it excludes this corporation; and the attempt on the part of the state of Pennsylvania to authorize this corporation to have an office, or to do business any where else, except in the state of Pennsylvania, is *ultra vires*, illegal and void. The truth is, that while this supposed corporation was originally organized for the whole United States, except the state of Pennsylvania, and afterward by its amended charter of February 17, 1870, for the whole world except Pennsylvania, it had no legal or valid existence any where upon the face of the earth. At the very creation of this supposed corporation its creator spurned it from the land of its birth, as illegitimate and unworthy of a home among its kindred, and sent it forth, a wanderer on foreign soil. Is the state of Kansas bound by any kind of courtesy, or comity, or friendship, or kindness to Pennsylvania, to treat this corporation better than its creator (the state of Pennsylvania) has done? It can hardly be supposed so, when we come to see how carefully our own constitution has guarded the creation of corporations in our own state."

There does not seem to be any ground for the position that such a corporation can have no legal existence any where, and that it is, consequently, an impossibility. If corporations may exercise their powers any where, in the absence of restrictions in their charters, and if they may be created for the express purpose of carrying on business in a foreign state, there does not seem to be any reason why a corporation may not be created to do business *exclusively* in a foreign state or states. Such a corporation would undoubtedly have a legal existence in the state creating it. So much of the decision of the Kansas court as denies the corporation in question the fact of legal existence any where would seem to be error. Having a legal existence as a corporation by the laws of Pennsylvania, and being a foreign corporation in fact, the only question was whether it had a right to do business in Kansas. The legislature of Kansas could, of course, have excluded all foreign corporations or could have excluded all such as were organized to do business exclusively in foreign territory. But it had not done so. It was simply a question of comity. Nothing in the general powers of the corporation, or in the nature of its business, or in its particular acts, was opposed to the policy or interests of the state of Kansas. On the contrary the court says: "It must be admitted that the plaintiffs have been of great benefit to the people of Kansas. They have vastly increased the wealth of the state. They have expended millions of money in enterprises of incalculable benefit to the public. They have built, and are building within this state, long lines of railroads, instruments of commerce and intercourse essential to the prosperity of any people, and a species of improvement, without which civilization itself could no longer progress." Manifestly, if the corporation in question had been unrestricted as to territory, no objection would have existed to its operating in Kansas. So long as the policy and interests of Kansas were not opposed to the business which the corporation was authorized to do, nor to that business being conducted by a corporation or even by a foreign corporation, it would seem to be entirely immaterial, in determining the question of comity, whether the corporation had power to operate in some other state or not.

In *Merrick v. Van Santvoord*, 34 N. Y. 206, the validity of a corporation

created by the laws of New York to navigate vessels "upon any water or waters *not within the jurisdiction of New York*," is affirmed by implication. "A corporate charter," says the court in that case, "is in the nature of a commission from the state to its citizens, and their successors in interest, whether at home or abroad. Each government, in the exercise of its own discretion, determines the condition of its grant. It is free to impose or omit territorial restrictions. It cannot enlarge its own jurisdiction, but it can confer general powers, to be exercised within its bounds, or beyond them, wherever the comity of nations is respected. For the purposes of commerce, such a commission is regarded, like a government flag, as a symbol of allegiance and authority; and it is entitled to recognition abroad until it forfeits recognition at home. Under such commissions, New York has sent forth its citizens from time to time with corporate franchises and immunities, to gather wealth from the coal mines of Pennsylvania, the silver mines of Mexico, and the gold mines of California; to establish lines of inland navigation on the Orinoco and the Amazon; to plant forest trees beyond the Mississippi; to fish in the northern and southern oceans; to found Christian missions in Asia, and to colonize freedmen on the coast of Africa. In many of these cases the franchises were, by the terms of the charter, to be exercised in foreign territory. \* \* \* We think the policy of the state is in harmony with that of the country, and that it would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad. Our national commerce is but the aggregate of that of the states, and every needless restriction, by the operation of local laws, is unjust and calamitous to all. We suppose the rules of comity, on which we have heretofore acted, to be generally accepted and approved. We see no reason why a southern state may not grant, to a corporation of its planters, the right to erect mills for the manufacture of their cotton in New England; nor why the legislature of Massachusetts may not authorize a company of Lowell millers to raise cotton in South America or on the Sea Islands. The state of Illinois touches neither the Atlantic nor the Pacific; but if it should organize a company of its citizens to transport produce on the ocean, with its office in the city of New York, and its business conducted by managers elected annually in Chicago, the rights of the corporation would be recognized wherever the obligations of national laws are respected."

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## IN RE BONDS OF MADERA IRRIGATION DISTRICT.

(Supreme Court of California, Dec. 12, 1891.)

1. IRRIGATION DISTRICTS. CONSTITUTIONAL LAW. The Statute of 1887, page 29, which provides for the organization and government of irrigation districts, is for a public purpose and within the constitutional power of the legislature to make laws for the welfare of the state.

2. WHETHER STATUTE PROVIDING FOR IRRIGATION DISTRICTS IS SPECIAL LEGISLATION. The constitutional provision that, "corporations for municipal

purposes shall not be created by special laws," does not prevent the legislature from authorizing, by general laws, the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization only in certain portions of the state, or from providing, by different general laws, for the organization of such and so many species of public corporations, as in its judgment are demanded by the welfare of the state.

3. PROCEEDINGS TO ORGANIZE DISTRICT. SUFFICIENCY OF BOND ACCOMPANYING PETITION. The board of supervisors petitioned to organize an irrigation district is sole judge of the sufficiency of the bond accompanying such petition.

4. SUFFICIENCY OF PETITION. DESCRIPTION OF BOUNDARIES. The provisions that the petition shall particularly set forth and describe the boundaries of the district sought to be organized does not require that they shall be described with more particularity than would be necessary in an act of the legislature creating a particular district or a municipal corporation.

5. EVIDENCE ON HEARING TO DETERMINE SUFFICIENCY OF PROCEEDINGS. Act March 16, 1889 (Stat. 1889, p. 212), section 5, provides for a hearing in court to examine and determine the legality and validity of the proceedings had for the organization of irrigation districts, and the legality of the bonds to be issued, and the sale thereof. Section 2 provides that the "petition shall state facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized," etc. Section 4 provides: "The provisions of Code Civil Procedure respecting the answer to a verified complaint shall be applicable to the answer of said petition," etc. A petition under said statute alleged that the petitioner was duly organized, etc., and the answer thereto denied that any of the steps required for the organization were taken. Held, that as it was the duty of the court to determine the legality of the organization, the record of the board of supervisors that there was evidence, to the satisfaction of the board, on the question whether there were the required number of *bona fide* freeholders within the boundaries of the proposed district who had signed the petition, was incompetent evidence to show the legality of the proceedings.

6. DEFECTIVE ORDER IN REFERENCE TO ISSUANCE OF BONDS. The proceedings for the organization were not defective, though the order for the issuing the bonds did not conform strictly to the statute, since the statute may be followed by the board of directors when issuance by them becomes necessary.

7. The conclusion of the decree, confirming the legality of the organization, which purports to forever bar all persons interested in the organization of the district, save the contestants herein, from denying any fact relating to the organization, or "providing for and authorizing the issue and sale of the bonds of said district, which might by them have been denied, questioned or disputed in this proceeding," was not authorized by the statute.

**I**N bank. Appeal from superior court, Fresno county, J. B. Campbell, judge. Special proceedings by petition of the board of directors of the Madera irrigation district for the confirmation

of their organization, and proceedings for the issue and sale of certain bonds of the district. The proceedings were contested by persons owning land within the district. On the hearing a decree was entered in accordance with the petition, and the contestants appeal.

*R. E. Houghton, Octave G. Du Py, Mesick, Maxwell & Phelan, Page & Eells, Pillsbury & Blanding, E. W. Magraw and E. W. McKinstry* for appellants. *Hinds & Merriam, Craig & Meredith* and *C. C. Wright* for respondent.

HARRISON, J. The board of directors of the Madera irrigation district, on the 25th of May, 1889, filed in the superior court of the county of Fresno, in pursuance of the act of March 16, 1889 (Stat. 1889, p. 212), a petition for the confirmation by that court of their proceedings for the issue and sale of certain bonds of said district, amounting to \$850,000. In their petition they alleged that "said Madera irrigation district was duly organized under the laws of the state of California, and especially under the provisions of the act approved March 7, 1887" (Stat. 1887, p. 29); and set forth the various steps taken by them in reference to the issue and sale of the bonds, and prayed "that the proceedings aforesaid for the issue and sale of the bonds of said district may be examined, approved and confirmed by said court, and for all and any legal and equitable relief which may be provided by law, and which the court shall deem meet." Notice was thereupon given by order of the court that the hearing of said petition would be had July 5, 1889; and prior to that day the appellants herein filed answers thereto, showing that they were owners of lands within the district to be affected by said bonds, and specifically denying the allegations in said petition. At the hearing upon the issues presented by the answers of the appellants the court rendered its judgment in favor of petitioners, and approved and confirmed "the legality and the validity of each and all of the proceedings for the organization of said Madera irrigation district," and further adjudged and decreed that "each and all of the proceedings taken to secure and provide for and authorizing the issue and sale of bonds of said district in the sum of \$850,000, and affecting the legality and validity of said bonds, up to and including

the resolutions and orders of the board of directors of said district, made March 13, 1889, authorizing the issuance and sale of said bonds, be, and the same are hereby, approved and confirmed." From this judgment an appeal has been taken directly upon the judgment-roll, bringing here the proceedings at the trial of the issues by a bill of exceptions.

In presenting their appeal, the appellants have contended that the act of March 7, 1887, under which the proceedings for the organization of the district were had, is unconstitutional, for the reason that it is in its nature beyond the power of the legislature to enact, and also by reason of the provisions therein contained for the organization of the district, and the mode provided for assessments upon the lands in said district, with which to meet the bonds authorized by the act. It is also contended by them that, at the hearing of the proceedings in the court below, the petitioners did not establish by competent evidence that there had been such compliance with the requirements of the act as would constitute a district, or give any authority to provide for the issuance of the bonds in question, and that the evidence upon which the court made its findings was improperly admitted and considered by it. The constitutionality of the act in question was passed upon by this court and affirmed in the case of *Irrigation Dist. v. Williams*, 76 Cal. 360; 18 Pac. Rep'r, 379, and also in the case of *Irrigation Dist. v. De Lappe*, 79 Cal. 351; 21 Pac. Rep'r, 825; but, inasmuch as counsel have made elaborate arguments herein in review of the conclusion reached in those cases, we have again examined the question in the light of these arguments, and in affirming those decisions we present the reasons upon which we again hold the act to be constitutional more at length than was presented in the former opinions.

1. That the legislature is vested with the whole of the legislative power of the state, and that it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. The declaration in article 4, section 1, of the constitution, "The legislative power of this state shall be vested in a senate and assembly, which shall be designated the



'legislature of the state of California,'” comprehends the exercise of all the sovereign authority of the state in matters which are properly the subject of legislation; and it is incumbent upon any one who will challenge an act of the legislature as being invalid to show either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration of the legislature. The presumption which attends every act of the legislature is that it is within its power, and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.

In providing for the welfare of the state and its several parts, the legislature may pass laws affecting the people of the entire state, or, when not restrained by constitutional provisions, affecting only limited portions of the state. It may make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character. It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purposes of such legislation, or it may create new districts embracing more than one county, or parts of several counties, and may delegate to such organizations a part of its legislative power to be exercised within the boundaries of said organized districts, and may vest them with certain powers of local legislation, in respect to which the parties interested may be supposed more competent to judge of their needs than the central authority. “The members of the two houses are the constitutional agents of the public will in every district or locality of the state, and they may, therefore, so arrange the powers to be given and executed therein as convenience, the efficiency of administration, and the public good may seem to require, by committing some functions to local jurisdictions already established, or by establishing local jurisdictions for that express purpose.” *People v. Salomon*, 51 Ill. 50. “If from exceptional causes the public good requires that legislation, either permanent or temporary, be directed toward any particular local-

ity, whether consisting of one county or several counties, it is within the discretion of the legislature to apply such legislation as in its judgment the exigency of the case may require, and it is the sole judge of the existence of such causes. The representatives of the whole people, convened in the two branches of the legislature, are, subject to the exceptions which have been mentioned, the organs of the public will in every district or locality of the state. It follows that it falls to the legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficacy of administration, and the public good may seem to require." *People v. Draper*, 15 N. Y. 544.

In providing for the public welfare, or in enacting laws which in the judgment of the legislature may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. We do not mean by this that the declaration of the legislature that an act proposed by it will be for the public good will of necessity preclude an investigation therein, or that such declaration will be conclusive when the act itself is palpably otherwise. *Consolidated C. Co. v. Central Pac. R. Co.*, 51 Cal. 269. Acts may be passed by that body which will, by their very terms, or the nature of their provisions, show that their purpose is private, rather than public. Such are the acts that were involved in the cases of *Association v. Topeka*, 20 Wall. 664; *Allen v. Inhabitants*, 60 Me. 124; *Lowell v. City of Boston*, 111 Mass. 454; *State v. Osawkee*, 14 Kans. 419; *People v. Parks*, 58 Cal. 624. But if the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court. *Railroad Co. v. City of Stockton*, 41 Cal. 147. It may be more difficult to define in advance the line of separation between a purpose which is private and one which is public, than to determine whether in the individual case the act is for a public or a private purpose, and, as was said by Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 104, it is wiser to proceed "by the gradual process of judicial inclusion and exclusion as the

cases presented for decision shall require." Whenever it is apparent from the scope of the act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public. We have recently held that an appropriation by the legislature of \$300,000 for the World's Fair Columbian Exposition at Chicago (*Daggett v. Colgan* [Cal.], 28 Pac. Rep'r, 51) is to be sustained as a legitimate appropriation of the public moneys of the state, upon the ground that it is one of the objects of government to promote the public welfare of the state, and to provide for the material prosperity of its people, and that it is for the legislature to determine the manner and the extent to which it will exercise this function of government, and that its determination upon that point is limited by its own discretion, and beyond the interference of courts. The same rules of construction must be applied to the exercise of legislative authority in authorizing an expenditure for a local improvement. Such authorization is a legislative declaration that the expenditure is for a public purpose, and for the welfare of the public, and its action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it. In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public. In a state as diversified in character as is California, it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made for the government of town and country. Those portions of the state which are subject to overflow, and those which re-

quire drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the legislature, and its authority to legislate for the benefit of the entire state, or for the individual district. The power of the legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz.: that it is acting for the public good in its capacity as the representative of the entire state. Under this principle levee districts have been organized directly by the legislature itself, and their organization has been authorized by the legislature through the board of supervisors of the county in which the district is situated. Stat. 1867-68, p. 316. Such legislation was upheld in *Dean v. Davis*, 51 Cal. 406. Under the same principle, reclamation districts have been organized and their creation upheld as a legitimate exercise of legislative power. In passing upon this question in *Hagar v. Board*, 47 Cal. 233, the supreme court said: "The power of the legislature to compel local improvements which in its judgment will promote the health of the people and advance the public good is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvement;" and, in answer to the suggestion that such was merely a local improvement, the court said: "But we need not rest our decision upon the narrow ground that this is strictly a local improvement. On the contrary, the reclamation of the vast bodies of swamp and overflowed land in this state may justly be regarded as a public improvement of great magnitude and of the utmost importance to the community. If left wholly to individual enterprise, it probably would never be accomplished, and in inaugurating so great a work the legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to wit: by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited;" and refer in support of the opinion to the acts of different states in which similar improvements had been authorized.

The reasons given in that case are fully as potent in support of the authority exercised in the matter of an irrigation district; and

notwithstanding it is urged by counsel for appellants that the authority for reclaiming overflowed lands is to be upheld only as a sanitary measure, it will be seen that that is not the only ground upon which the court based its decision. Nor do we think that it rests upon that ground alone. In our opinion a more liberal construction should be given to the authority under which such a district is established. Certainly these grounds are not the basis of the authority for the creation of a levee district; that rests not upon any sanitary ground, but upon the ground of protection to the parties who would be affected by the overflow. *Williams v. Cammack*, 27 Miss. 222; *Wallace v. Shelton*, 14 La. Ann. 498. Upon this subject Mr. Cooley says: "But where any considerable tract of land owned by different persons is in a condition precluding cultivation by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement and the consequent advancement of the general interest of the locality as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes, which have for their object to protect lands from falling into a like condition of uselessness." *Cooley Tax'n*, p. 617.

We have not been cited to the statute of any other state which provides for irrigating arid lands, or to any authority in which the power of the legislature over the subject is discussed, but we have no hesitation in saying that the principles upon which the decisions to which we have referred were made are applicable to sustain the legislative authority in making provision for such irrigation. Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz.: the welfare of the public, and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the differ-

ent portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of "acquiring, possessing and protecting the property," which is guaranteed to them by the constitution. The local improvement contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement. This principle is not contravened by the fact that it may even operate injuriously upon some of the individuals or proprietors of land within the district, or by the fact that there may be some who for personal motives may wish to resist the improvement. Such result is only a sacrifice which the individual makes to the general good in compensation for the advantages enjoyed by virtue of the social compact. All laws of this character are upheld upon the same principle as is the creation of a district for the purpose of any other local improvement, such as the opening of a highway, or of a street, or of a public park. The legislature, to which has been confided the matter, has determined that it will be for the public good that such street or park be opened, and it has imposed the burden of such opening upon the property within a limited district. In each of such instances the land taxed for the improvement may not be the only land that will be benefited. Although land adjacent to the district may be incidentally benefited, that is no reason for taxing such land, nor is it any objection to the proceeding that some of the property within the district will not receive any benefit or that the improvement will more specifically benefit those who have procured its creation. "It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, every thing which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or

which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." *Talbot v. Hudson*, 16 Gray, 425.

The means by which the legislature may exercise this power are left to its own discretion, except as it may be limited by the constitution. If, in the exercise of its care for the public welfare, it finds that a specific district of the state needs legislation that is inapplicable to other parts of the state, it may, in the absence of constitutional restrictions, legislate directly for that district, or if it be the case that similar legislation be required for other portions of the state, it may provide for adapting such legislation to those portions at the will of the people in such districts, as was done in the reclamation and levee laws already referred to. It may, too, by general laws authorize the inhabitants of any district, under such restrictions, and with such preliminary steps as it may deem proper, to organize themselves into a public corporation for the purpose of exercising those governmental duties, upon the same principle as it authorizes the incorporation of any municipal corporation under general laws. The constitution of California has been framed with the principle of investing separate subdivisions of the state with local government, and especially authorizes the legislature to confer the power of local legislation upon such subdivisions within the state as may be organized under its authority. The legislature is itself forbidden to interfere in any manner, except by general laws, with the power of local legislation intrusted to such organizations, nor can it delegate to any but public corporations the power to perform any municipal functions whatever, or vest in any but the corporate authority of a municipal corporation the power to assess and collect taxes for any municipal purpose. But although the legislature is prevented from passing any special or local law which shall be applicable to only a particular portion or district of the state, its power of legislation for the public good in that portion of the state has not been destroyed. It still retains the full power of legislation conferred upon it in the constitution, but is required to exercise such power in the mode prescribed in that instrument. It may pass general laws, which from their nature will be capable of enforcement in only particular portions of the state; or it may by other general

laws authorize the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization only in certain portions of the state, and it may by such general laws provide for the organization of such and as many species of municipal corporations as in its judgment are demanded by the welfare of the state, and the "protection, security and benefit of the people," for which government is instituted, and which has been by the people confided to it. Const., art. 1, § 2. The provision in article 11, section 6, of the constitution, "Corporations for municipal purposes shall not be created by special laws," does not imply that the legislature must by any general law provide a plan in which shall be prescribed the mode under which all municipal corporations must be organized, and the powers that they can exercise. The provision in article 12, section 1, that private corporations "may be formed under general laws, but shall not be created by special act," although more explicit, and under the declaration of the constitution itself (art. 1, § 22), "mandatory" rather than permissive, requiring that they must be formed under general laws has never been construed as requiring that all private corporations must be formed under the same general law, or limited to the exercise of the same powers. On the contrary, the form of organization, as well as the powers to be exercised, have been by legislation adapted to the character of the corporation to be organized. All corporations of the same class are required to be organized in the same manner, but the nature of the organization does not permit, nor does the constitution require, that corporations of different classes shall be organized in the same manner, or provided with the same powers. Hence the provisions that have been made by the legislature for the organization and powers of railroad, insurance, religious, mining and other business corporations have been adapted to their respective character and needs. With greater propriety has it been left to the legislature to provide the mode of organization and the powers to be exercised by different species of municipal corporations. Such corporations are but the agents or representatives of the state in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the legislature in its desire to provide for the general welfare of the state, and in the accomplishment of which legisla-



tive convenience or constitutional requirements have made them essential. Although in this state the legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which without such restriction it could itself have exercised; and in providing for such organizations it need confer upon them only such powers as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws which the legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these objects the law is the same, but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park, or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is applicable at the time of its enactment, the legislature would be justified under its legislative power to pass general laws, in making such provision for that district. Whenever a special district of the state requires special legislation therefor, it is competent for the legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district. Being created for the purpose of discharging only one public purpose, it is not requisite that it have power not necessary therefor, or which would be appropriate to a corporation organized for some other purpose. Neither is it requisite that such corporation should have legislative or judicial powers

conferred upon it. It may be organized for the mere purpose of exercising executive and administrative functions, with the added power of making such prudential rules and regulations as may be necessary for the exercise of the particular functions intrusted to its charge. The powers committed to a public corporation organized for the administration of a public park, or for the government of a levee district, or for the control of the police department, need be only such as are peculiarly appropriate to such organizations.

It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that because the corporation is not "created" until the voters of the district have accepted the terms of the act, the answer is that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act. The municipal corporations which may be thus created are not limited to cities and towns. The constitution makes provision in various places for municipal corporations other than cities and towns. Art. 11, §§ 9, 10, 12, 16. In each of these sections provision is made with reference to the government or officers of "county, city, town or other public or municipal corporation;" thus clearly indicating that there may be municipal corporations other than those of a town or city, and, consequently, that the provisions with reference to the incorporation of cities and towns found in section 6 of the same article are not controlling in the organization of other municipal corporations, and that, while the constitution carefully provides for the "incorporation, organization and classification" of cities and

towns, it makes no similar provision for other municipal corporations, but very properly leaves such action to the discretion of the legislature. Inasmuch as there is no restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization.

In the present case the legislature has chosen to authorize the creation of a public corporation, in the manner and with the forms specified in the act under discussion. For this purpose it has provided that a petition of fifty freeholders, or a majority of the freeholders owning lands within a proposed district susceptible of one mode of irrigation, shall be presented to the board of supervisors of the county within which such lands are situate; and that the board of supervisors shall, upon the hearing of such petition, after notice thereof, determine whether or not it will take steps to organize an irrigation district; and that upon such determination an election shall be ordered, at which, if two-thirds of the electors within the district shall vote in favor of such organization, the district shall thereupon be organized and its management confided to a board of directors chosen by the electors of that district. It is objected to this that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors, within that district, or who may even be non-residents of the district. This, however, is a matter which was addressed purely to the discretion of the legislature. Whether such a petition should be made by the owners of a fixed proportion of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the legislature. It is not for this department of the government to question the policy or the prudence of a co-ordinate branch. If those who are affected by its proceedings feel that it

has not given them sufficient protection, or placed sufficient safeguards around the institution of the corporation, they must seek redress from that body. We can only act upon the law as it has been enacted. It must be observed, however, that this petition has no binding operation, but is merely the initiatory step which gives to the board of supervisors a jurisdiction to act upon the expediency or policy of authorizing the creation of the district. That body is the representative of the county, and has been chosen by its electors for the express purpose of legislation upon local subjects, and may naturally be supposed to have the interests of the entire county, as well as of each of its parts, in charge, and to be acquainted with its needs and requirements. The legislature has not, however, intrusted that body with the final determination of the question, but has authorized it to submit the question to a vote of the electors of the district, and it is only when these electors have determined by a vote of two-thirds of their number in favor thereof that the district can be created as a political body. The objection that this vote may be carried by a majority of those who have no interest in the lands affected thereby is but an incident, and not of the essence of the matter. It is no more than exists in every popular vote which involves the creation of a municipal debt or the adoption of a municipal organization. The fact that the owners of the lands are non-residents within the district, and not allowed a voice in the proceedings, is of the same character. Property qualification for voting, either in amount or character, is expressly forbidden by article 1, section 24, of the constitution, which declares: "No property qualification shall ever be required for any person to vote or hold office;" and, however much non-residents may be affected by the acts and vote of the community, only those who are inhabitants of the district can, by the constitution, be permitted to vote at any election. Art. 2, § 1.

That an irrigation district, organized under the act in question, becomes a public corporation, is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county — the legislative body of one of the constitutional subdivisions of the state: its organization can be effected only upon the vote of the qualified

electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in the state — the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required for the purpose of conducting the election; and the officers when elected being required to execute official bonds to the state of California, approved by a judge of the superior court. The district officers thus become public officers of the state. When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purposes of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds; and these bonds and the interest thereon are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed, may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. "Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the state in affecting a great public improvement, it is a public corporation." Ang. & A. Corp., § 32. "A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality of its people. The primary idea is an agency

to regulate and administer the interior concerns of the locality in matters peculiar to the place incorporated, and not common to the state or people at large." 15 Amer. & Eng. Enc. Law, p. 954. "Public corporations are such as are created for the discharge of public duties in the administration of civil government." Lawson Rights, Rem. & Pr. 332.

The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation, to be invested with certain political duties which it is to exercise in behalf of the state. *Dean v. Davis*, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote, in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final. *People v. Smith*, 21 N. Y. 595; *Gilmore v. Hentig*, 33 Kans. 170; 5 Pac. Rep'r, 781; *Hagar v. Reclamation Dist.*, 111 U. S. 701; 4 Sup. Ct Rep'r, 663; *Davies v. City of Los Angeles*, 86 Cal. 46; 24 Pac. Rep'r, 771.

It is also objected that the mode provided for the payment of

the bonds is unconstitutional, in that it provides for an assessment upon the real property within the district according to its value, and not according to the benefit which each particular parcel of land may derive from the improvement. The power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions. This is one of the attributes of sovereignty which the people have placed in its hands; and they have intrusted its exercise to its discretion, either in the manner or to the extent to which it is to be applied. All taxation has its source in the necessities of organized society, and is limited by such necessity, and can be exercised only by some demand for the public use or welfare. And, whether the tax be by direct imposition for revenue or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire state is benefited, and authorize the burden to be borne by a public tax, or it may declare that all or a portion of the property within a limited region is benefited, either according to its value or in proportion to its actual benefit, to be specifically ascertained by actual determination of officers appointed therefor. Upon the power of the legislature over the subject of taxation, as well as the modes in which and the objects upon which it may be exercised, we know of nothing that has been written in any opinion since that of Judge Ruggles in *People v. Brooklyn*, 4 N. Y. 419, which is not either an amplification of the views therein expressed, or an adaptation of them to the particular subject under discussion. In the exhaustive opinion of Mr. Justice Sawyer in *Emery v. Gas Co.*, 28 Cal. 345, the principles declared in that opinion were applied to the case then before the court, wherein this power of taxation was shown to be the foundation for upholding the right of assessment in a manner different from the *ad valorem* principle. The controversy upon this subject has almost invariably been against the "front-foot"

rule, and in favor of the *ad valorem* principle; and in nearly every state, unless it be New Jersey, the principle has been maintained that it is within the power of the legislature to adopt whichever rule it may select. In *Burnett v. Sacramento*, 12 Cal. 76, the charter of Sacramento provided that the expense of a local improvement should be assessed upon the adjacent property according to its value, and upon this point the supreme court, speaking through Judge Field, said: "The law in question avoids the injustice of general taxation for local purposes, and lays the burdens upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property, which is as near an approximation to an equitable rule as can well be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment, like the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the legislature, and they are responsible to their constituents." Assessments for local improvements according to the value of the property assessed have been upheld in *Downer v. Boston*, 7 Cnsh. 277; *Snow v. Fitchburg*, 136 Mass. 183; *Gilmore v. Hentig*, 33 Kans. 174; 5 Pac. Rep'r, 781; *Strowbridge v. Portland*, 8 Oreg. 82; *Creighton v. Scott*, 14 Ohio St. 438; *Lockwood v. St. Louis*, 24 Mo. 20.

It is, however, for the legislature to determine how the apportionment shall be made, and, while it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the tax-payers. As was said by Mr. Justice Temple, in *Lent v. Tillson*, 72 Cal. 428; 14 Pac. Rep'r, 71: "The main practical difference between assessment for a local improvement and general taxation seems to be that in general taxation it is difficult and generally impossible for the court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the tax-payer, while in



local assessments it is more often easy to see that the improvement will not be a special benefit. Still, the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature and purposes, and within these limits the legislature is the sole judge of when and to what extent the power shall be used;” and again: “The power being in the legislature, the limitations upon it must be found in the constitution, either in express provisions or by implication, and there exists the same presumption that the law is within legislative power that applies to any other statute; that is, the law will not be declared unconstitutional unless it plainly appears to be so.” Page 430, 72 Cal., and page 81, 14 Pac. Rep’r. Mr. Cooley says, in his treatise on Taxation (p. 622): “The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere.” And, in *Hagar v. Board*, supra, the court said: “It is equally clear that those clauses which provide that taxation shall be equal and uniform throughout the state, and which prescribe the mode of assessment and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements.” In accordance with this principle, various modes of apportionment for the expenses of local improvements have been upheld. We have already seen that they have been upheld when made in accordance with the value of the property, as well as when made in proportion to the frontage of the lots. The legislature has also itself designated the district which will be benefited by the improvement, as was done in the Dupont Street Improvement (Stat. 1875-76, p. 433), and as has been provided in the general act for street improvements, where the entire frontage of the block is the district upon which the assessment is to be made. *Diggins v. Brown*, 76 Cal. 318; 18 Pac. Rep’r, 373. Assessments have also been upheld when made by commissioners appointed to make specific assessments upon the several parcels of land (*Bridge Co. v. Kirkham*, 64 Cal. 519; 2 Pac. Rep’r, 409), or when made according to the area of the land affected by the improvement. *Keese v. City of Denver*, 10 Col. 123; 15 Pac.

Rep'r, 825. The legislature has itself levied a specific tax upon each acre of land within a district created by itself (*Levee Co., v. Hardin*, 27 Mo. 495; *Williams v. Cammack*, 27 Miss. 209; *Alcorn v. Hamer*, 38 Miss. 652), and has authorized such tax to be levied by the district (*Wallace v. Shelton*, 14 La. Ann. 498); and has authorized a fixed uniform rate for each sewer upon the estimated cost of all the sewers within the district. *Leominster v. Conant*, 139 Mass. 384; 2 N. E. Rep'r, 690.

It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements; and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby that it must bear a portion of the burden. If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense, or, if within the limits of a drainage district there should chance to be found a cliff, that would be no reason for exempting it from assessment. The objection that the legislature has no authority to confer upon the supervisors of a county the right to create a corporation whose district shall embrace a portion of the territory of another county does not arise in the present case. It is not contended that any portion of the Madera irrigation district lies outside of the county of Fresno.

2. One of the objections to the sufficiency of the proceedings taken by the supervisors in authorizing a vote by the electors for the purpose of determining whether the district should be organized is that the bond which accompanied the petition was so defective as to deprive the board of jurisdiction to authorize such election.

If it be conceded that the presentation to the board of a bond with the petition is a jurisdictional prerequisite to their consideration of the petition, we do not think that such element of jurisdiction was wanting in the present case. The bond which was presented,

although informal, was not invalid, and was of binding obligation upon those who had signed it. In such a case the determination of its sufficiency by the board of supervisors was as conclusive as their determination respecting the pecuniary responsibility of its signers, or the amount for which the bond should be given.

3. Other objections to the constitutionality of the act, and the sufficiency of the proceedings in the organization of the district, have been presented by the appellants, but we think that they are covered by the views presented in the foregoing opinion. We do not think that the boundaries of the district, or of the election precincts, are so imperfectly described as to prevent the supervisors from acquiring jurisdiction for authorizing the organization of the district. The provision in the statute that the petition shall particularly set forth and describe the boundaries does not mean that they shall be set forth and described with more particularity than would be necessary in an act of the legislature creating a political district or a municipal corporation. If the course of a boundary is given, it is not necessary that such course shall have been actually surveyed upon the ground before the boundary can be said to be particularly described, and a reference to an official map, or to a land-mark designated upon such map, is as definite as would be a reference to the land-mark itself. We cannot, from their description, say that the boundaries given in the petition are so indefinite that the district cannot be definitely located, or that they fail to embrace a distinct and definite territory. As illustrations of similar descriptions in acts of the legislature, we refer to the act incorporating the city of Sacramento (Stat. 1850, p. 70), and the act incorporating the city and county of San Francisco (Stat. 1856, p. 146); also the act setting forth the boundaries of the county of San Benito (Stat. 1873-74, p. 95). The case of *Crosby v. Dowd*, 61 Cal. 557, referred to by appellants, was expressly overruled in *De Sepulveda v. Baugh*, 74 Cal. 468; 16 Pac. Rep'r, 223. The boundaries of a municipal corporation are not construed with any more strictness than is required in the case of a private grant. This subject was fully considered in *Irrigation Dist. v. De Lappe*, *supra*.

4. By the act of March 16, 1889 (Stat. 1889, p. 212), under which these proceedings were instituted, it is provided in section 5 that, "upon the hearing of such special proceedings, the

court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of, the proceedings for the organization of said district, under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof." It is also provided in section 2 that "the petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization, or the election of said first board of directors." Section 4 of the act provides: "The provisions of the Code of Civil Procedure respecting the answer to a verified complaint shall be applicable to an answer to said petition. \* \*

\* The rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this act, are applicable to the special proceeding herein provided for." The petition in the present case states "that said Madera irrigation district was duly organized under the laws of the state of California, and especially under the provisions" of the act of March 7, 1887. The answers deny this allegation, and deny specifically that any of the steps required by the statute for the organization of the district were taken in reference thereto. In order that the court might determine the legality and validity of the proceedings, it was required by the act in question to "examine" them. The act provides that it "shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district;" and, unless it shall "examine" the proceedings, it would not have the power to "determine" their legality and validity. One step in the proceedings, and that which was the foundation of all others, and without which the whole superstructure of the corporation and its acts, culminating in the bonds sought to be validated, would have fallen, was that a petition should have been presented to the board of supervisors, signed by fifty or a majority of freeholders owning lands within the boundaries of the proposed district. It was necessary, therefore, for the petitioners herein to make proof to the court that

such a petition had been presented to the board of supervisors. Instead, however, of making such proof, they introduced in evidence the record of the proceedings of the board of supervisors, which contained recitals that a petition had been presented to said board, and that, before hearing said petition, evidence to the satisfaction of the board was adduced by petitioners upon the question whether or not there were fifty petitioners whose genuine signatures appeared affixed to said petition, who were *bona fide* freeholders of lands within the proposed boundaries of said proposed irrigation district; whereupon the board, having announced that they are satisfied that there were fifty such freeholders, whose signatures appeared affixed to said petition, proceeded to hear said petition. The defendants objected to the introduction of this evidence upon the ground that no foundation had been laid therefor, and that it was irrelevant, immaterial and incompetent to establish any issue before the court. The objections were overruled, and an exception taken by the defendants. The petitioners then offered in evidence a document purporting to be a petition, with the signatures of upward of fifty names attached thereto. To the introduction of this document the defendants objected, upon the ground that its execution had not been shown, and that there was no evidence that the parties whose names appeared attached thereto were freeholders owning lands within the district. The court overruled the objection, to which the defendants excepted. In these rulings the court erred. There was no proof that the petition had been signed by either of the persons whose names were attached thereto, or that either of said persons was a freeholder, owning lands within the boundaries designated in the petition. Whether a petition had been presented to the board of supervisors of such a character as to give to that board jurisdiction to act in accordance with the provisions of the law in question was an issue before the court, to be determined by competent evidence. A declaration by the board of supervisors that such a petition had been presented, even though such declaration was spread upon their records, was not competent evidence in this proceeding, as it was only hearsay. No board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction. It may be held that, when the question of such jurisdiction arises in some collateral proceeding, the act of the board in recognition of the sufficiency

of the petition would be presumptive of such sufficiency, yet, when the very issue to be determined by the court is whether the petition was sufficient to give jurisdiction, such issue must be established by evidence as competent as that which is required to establish an issue in any other proceeding. In the absence of any statutory declaration respecting the character of the proof by which any fact may be established in a court of justice, it must be established in accordance with the common-law rules of evidence. It is sometimes provided by statute that in proceedings of this nature the act of the board of supervisors shall be *prima facie* evidence of the regularity of all proceedings prior to the making of the order, as was the case in *Damp v. Town of Dane*, 29 Wis. 426, and also in *Re Kiernan*, 62 N. Y. 459. The effect of such provision is to throw the burden of proof upon those who would challenge the sufficiency of the petition. In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. In the absence of such statutory provision, however, the burden of proving any affirmative allegation is upon him who makes it (Code Civil Proc., § 1869), and it must be established under the ordinary rules of evidence. The statute in the present case is silent with reference to the effect as evidence of the action of the board of supervisors upon the petition. We are not aware of any statute which gives to their action any effect as evidence, or which makes their records evidence of any fact other than the corporate act therein recorded. Their records can be competent evidence of only such matters as they are by statute authorized to make matters of record. The statute herein does not authorize the board of supervisors to enter upon their records the facts which give them jurisdiction to hear the petition, or any evidence of such facts, and the entry in their record of such facts, or of such evidence, does not give thereto any official sanction or right of recognition more than any other memorandum that may have been made by their clerk. In *People v. Hagar*, 49 Cal. 232, when the question arose in a collateral proceeding, and it was contended that the certificate by the commissioners of a compliance by them with the requirements of the statute was evidence thereof, the court held otherwise, saying: "Whatever may have been the rule, if the statute had required the commissioners to state in their

certificate to the assessment-roll that they had jointly viewed and assessed the land, it is clear that the certificate can have no such conclusive effect, unless it was incumbent on the commissioners to certify that they acted jointly in viewing and assessing the land. But, as the statute does not require them to state that fact in the certificate, their having voluntarily done so was a superfluous act, and, instead of being conclusive of the fact that they acted jointly, was not even *prima facie* evidence of it."

It was held in *Dean v. Davis*, 51 Cal. 406, that in a collateral proceeding the regularity of the proceedings under which the district had been organized could not be questioned, under the rule that, being a *de facto* corporation, only the state could take advantage of any irregularity in its organization. In *Lent v. Tillson*, 72 Cal. 422; 14 Pac. Rep'r, 71, the court, however, questioned the power of the county court in that case to pass upon the questions upon which its jurisdiction depended, so as to conclude an inquiry, even upon a collateral attack; and in *Kahn v. Supervisors*, 79 Cal. 400; 21 Pac. Rep'r, 849, the court said: "Nor should this jurisdiction be held to attach, whatever court may have ruled that the petition was signed by a majority, when in fact it was signed only by a minority, of the owners designated by the statute." The cases cited on behalf of the respondent in support of the action of the court below are all cases in which the question was presented in a collateral proceeding. In *Humboldt Co. v. Dinsmore*, 75 Cal. 604; 17 Pac. Rep'r, 710, it was admitted that the persons who signed the petition were freeholders. After jurisdiction had once been obtained, other proceedings subsequent thereto are movements within the jurisdiction, and can be questioned only by direct attack; but the fact of jurisdiction must be affirmatively shown whenever that is the issue to be determined. It is unnecessary, however, in the present case, to determine what would be the rule if the question should arise in a proceeding where the jurisdiction would be collaterally attacked. The question does not arise collaterally here. The corporation has itself come into court and challenged an examination into the regularity of its organization, and asks the court to examine "each and all of the proceedings for the organization of said district." Upon such a proceeding it becomes as necessary for it to establish such regularity, and to give evidence of each step therein, as fully as if its

acts were under investigation upon a writ of review, or as if the state were by *quo warranto* questioning its right to exercise the franchise of a corporation. In such a case it is incumbent upon it to make proof of every step required by statute for assuming corporate powers. High Extr. Rem. 712, 716; Larke v. Crawford, 28 Mich. 88. Upon *certiorari*, though the inferior tribunal is required to certify only matters of record, yet, if the jurisdictional facts do not appear of record, it must certify "not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question, as to the jurisdiction of the tribunal, may be involved." Blair v. Hamilton, 32 Cal. 52; Whitney v. Board, 14 Cal. 479; Lowe v. Alexander, 15 Cal. 300. The object of the act in question, as was said in Board v. Tregea, 88 Cal. 334; 26 Pac. Rep'r, 237, is for the purpose of affording to investors in the bonds the security of a judicial determination of their validity, and, in order that this may have the effect intended by the legislature, it is not sufficient for the court to perform the mere perfunctory office of recording the determination of the board of supervisors that its proceedings in the organization of the district were regular. The court is not a *lit de justice* for the mere purpose of entering of record the rescripts of the board of supervisors, and giving to them the dignity of its own judgment. When the defendants controverted the allegations of the petition that the irrigation district was duly organized, it became necessary for the petitioners to establish at the trial the facts showing that it had been duly organized.

Section 456, Code Civil Procedure, provides: "In pleading a judgment or other determination of a court, officer or board it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." The provision in the act in question that the rules of pleading and practice provided by the Code of Civil Procedure should be applicable to this proceeding made it incumbent upon the petitioner to establish the due organization of the district by evidence competent therefor. We are not aware of any decision in this state in which it has been held that the decision of an inferior board



upon the question of its own jurisdiction was conclusive on a collateral attack, or even *prima facie* evidence of the fact in a direct proceeding. In *Litchfield v. Vernon*, 41 N. Y. 123, the legislature had authorized a local improvement to be made "upon application of a majority of the owners of land in the district proposed to be assessed," and the sufficiency of an assessment therefor was afterward contested in the courts. Upon the hearing in the court of appeals, the court used the following language: "This brings us to the only remaining question in the case, and that is whether there was any competent evidence authorizing a finding that a majority of the owners of land within the territory made subject to assessment made application to the common council, requesting them to make application to the supreme court for the appointment of three commissioners, as provided by the first section of the act of 1859. The act itself is wholly silent as to how this essential fact shall be proved. The right of the common council to apply for the appointment of the commissioners lies at the foundation of the whole proceeding. Unless this right existed, all the proceedings in appointing the commissioners, and subsequent thereto, are void. This right depends upon the question whether a majority of the land-owners petitioned the common council to proceed under the act. In the absence of such petition the common council had no authority in the premises, and nothing could be done under the act. The act does not provide for the determination of this fact by the common council, nor by the special term upon the presentation of the petition for the appointment of the commissioners. The act being silent as to what should be deemed proof of the fact that a majority of the land-owners petitioned the common council, the plaintiff was bound to prove such fact by competent, common-law evidence. This could be done by proof showing who were the owners of the land at the time of the passage of the act, and that a majority of such persons petitioned the common council, as required by the first section of the act. Neither the application of the council to the court, nor the affidavit of the mayor accompanying such application, was evidence of this fact against the defendant. *Sharp v. Speir*, 4 Hill, 76. There was no competent evidence of this fact given upon the trial, and the exception to the finding of this fact by the judge was well taken." In *Thorn v. Commissioners*, 130

Ill. 594; 22 N. E. Rep'r, 520, the same question was presented. The statutes of Illinois provided that the board of park commissioners might take jurisdiction over certain streets, upon first obtaining the consent, in writing, of the owners of a majority of the frontage of the lots and lands abutting thereon; and also provided for a confirmation of any assessment made therefor by the circuit court, upon the application of the commissioners, after notice therefor to the lot-owners. At the hearing of the application for confirmation of the assessment-roll, returned by the commissioners in the above case, the commissioners offered a paper, purporting to be the petition and consent of the abutting lot-owners, and showed that such paper came from the files kept by the board of commissioners, and was the written consent acted upon by the board in taking the streets for the purpose contemplated. The court below, upon the objection to the competency of this evidence, held that this document made a *prima facie* case for the commissioners, and cast the burden upon the objectors to show that it was not the written consent of the property-owners, as it purported to be. Upon appeal, however, the supreme court reversed the action of the court below, saying: "We cannot concur in the holding of the trial court. As we have seen, the burden was on the park commissioners to show affirmatively the jurisdictional fact of consent by the owners of the required amount of frontage. The evidence in respect thereto was, we think, wholly insufficient. Waiving the matter of proving ownership by the persons purporting to sign the paper admitted in evidence, it is not shown that a sufficient number of such persons signed the consent to constitute consent by the owners of a majority of the abutting property. The only person introduced who testified generally to the execution of the writing testifies that he procured the signatures of most of the signers, but not all, and he does not testify, except in a few instances, either as to those he did or did not procure. The writing here offered is not signed by the objectors, and we are aware of no rule by which it was admissible in evidence against them, without proof of its execution, nor is the consent at all aided by the fact that the park commissioners acted upon the paper introduced in evidence. While the park commissioners must, in the first instance, pass upon the fact of consent by the owners of abutting property, and

determine for themselves whether those owning a majority of the frontage of the property had consented to their appropriation of the street for the purposes contemplated by the act, such determination can have no effect, when their jurisdiction is challenged in endeavoring to carry out the powers conferred by the statute. The power conferred upon the park board affects and impairs the right of the citizen, and may incumber his property without his consent, and may arbitrarily impose onerous burdens for which there is no relief or redress. The legislature has interposed the safeguard of requiring the consent of the owners of more than one-half of the property to be affected, upon the presumption, no doubt, that what will be of benefit to the greater portion will not unduly prejudice the lesser part; and, when the commissioners sought confirmation of their assessment upon appellant's property, under the power conferred by the statute, it was incumbent upon them to show compliance with the law by which alone they obtained jurisdiction to impose the burden. This they have not done." See, also, *Pittsburg v. Walter*, 69 Penn. St. 365.

5. The order for the issuance of the bonds is that \$850,000 be issued, and that the said bonds shall be payable in installments, as follows: "At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent of said bonds," etc. Section 15 of the statute provides: "Said bonds shall be payable in gold coin of the United States, in installments, as follows, to-wit: At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent," etc. In *Irrigation Dist. v. De Lappe*, 79 Cal. 351; 21 Pac. Rep'r, 825, the form of the bond in connection with this provision of the statute was discussed. It was there held that the bonds to be issued should be in such form that each bond would be payable in installments of such percentage in each year as is designated in the statute, and that an order making that percentage of the entire issue of the bonds payable in the designated years would not be a compliance with the statute. In the present case, if five per cent of the \$850,000 should be payable at the expiration of eleven years, and the board of directors should not sell or dispose of more than that percentage of the entire issue of bonds, it would make the entire amount of outstanding bonds payable at the expiration

of eleven years ; whereas, the board of directors, under section 22 of the act in question, are authorized, at the expiration of ten years after the issuing of said bonds, to levy an assessment for only five per cent of the principal of the whole amount of bonds then outstanding. This provision in the order does not, however, affect the substance of the order for the issuance of the bonds, but merely the form in which the bonds are to be issued, and does not itself invalidate the proceedings had by the district for the issuance of the bonds. The district voted for the issuance of bonds to the amount of \$850,000, to be issued in accordance with the provisions of the statute. The manner in which those bonds were to be issued is prescribed by the statute, and can be followed by the board whenever their issuance becomes necessary. The court, however, instead of approving and confirming this order, should have limited its order of confirmation to that portion thereof which designated the amount of the bonds to be issued, leaving to the board itself the duty of preparing the bonds in the form required by the statute.

6. In its decree the court, after determining the legality and validity of the proceedings, added thereto the following: "And it is further ordered, adjudged and decreed that all persons, and each and every person interested in the organization of said irrigation district, save and except the appellants herein, be forever debarred and precluded from disputing, denying or disclaiming any fact or facts relating to the organization of the said district, or providing for and authorizing the issue and sale of the bonds of said district, which might by them have been denied, questioned or disputed in this proceeding." This portion of its judgment was unauthorized. The statute does not confer upon the court any power or jurisdiction to do more than "examine and determine the legality and validity of, and approve and confirm," the proceedings had under said act. What the effect of its determination and judgment may be is to be determined by the court in which it shall at any time hereafter be offered in evidence. The statute makes no provision for including therein an injunction against those who may not have seen fit to question its action in this proceeding, and against whom there has been no service, except by the publication of the notice directed by the court. If by virtue of such inaction on their part they should

be hereafter precluded or estopped from questioning the sufficiency of the action of the court in this proceeding, that question must be determined by the court in which any attempt may be made to avoid the effect of the judgment herein. For the error committed by the court in admitting evidence as hereinbefore stated the judgment is reversed.

We concur: McFarland, J.; Garoutte, J.; Sharpstein, J.; Paterson, J.; De Haven, J.

BEATTY, C. J. Until the filing of the supplemental briefs in this case I had supposed that the constitutionality of the statute commonly known as the "Wright act" had been definitely settled by the decision of this court in the case of *Irrigation Dist. v. Williams*, 76 Cal. 360; 18 Pac. Rep'r, 379, in which I was one of the counsel employed to defend the validity of the act. I, therefore, sat at the hearing of this case with the expectation of participating in its decision, but on becoming aware of the fact that the constitutionality of the law was again seriously drawn in question upon all the grounds formerly taken, and upon several others, I concluded that, although I might not be disqualified in a strict sense in this particular case, I could not with perfect propriety take part in deciding it, and for that reason express no opinion.

**Eminent domain—public use—irrigation.**—That providing for a system of irrigation is a public purpose for which private property may be condemned, under the authority of the legislature, is held in *Oury v. Goodwin*, 4 Am. R. R. & Corp. Rep. 81, where the question of public use is elaborately argued.

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### GILLINGHAM V. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia, Dec. 12, 1891.)

1. **RAILROAD COMPANIES AS COMMON CARRIERS OF PASSENGERS.** A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing.

2. **ONE RIDING IN CAR PRESUMED TO BE A PASSENGER.** Every one riding in a railroad car is presumed *prima facie* to be there lawfully, as a passenger having paid, or being liable when called on to pay, his fare.

3. DUTY OF COMPANY TO ITS PASSENGERS GENERALLY. It is the duty of the carrier to treat the passenger properly, and carry him safely, to protect the passenger against any injury from the negligence or willful misconduct of its servants while performing the contract, and of his fellow passengers and strangers, so far as practicable.

4. The common carrier of passengers is not an insurer of their safety or of their proper treatment, but is liable for their injury or improper treatment, due to the negligence or willful misconduct of its servants while engaged in executing the contract.

5. LIABILITY FOR FALSE IMPRISONMENT OF PASSENGER CAUSED BY CONDUCTOR. The common carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely.

6. EFFECT OF STATUTE MAKING CONDUCTORS CONSERVATORS OF THE PEACE. Section 81, chapter 145, of the Code, which enacts, among other things, that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train," does not relieve the carrier of passengers from such liability.

**E**RROR to circuit court, Cabell county. Action of trespass on the case by Elmer Gillingham against the Ohio River Railroad Company. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

*Z. T. Vinson* for plaintiff in error. *Gibson & Michie* for defendant in error.

HOLT, J. This was an action of trespass on the case, brought on the 15th day of October, 1889, in the circuit court of Cabell county, by Elmer Gillingham against the Ohio River Railroad Company averring, in substance, that at the station in the town of Huntington he was on defendant's passenger train, with the proper ticket for Ben Lomond, a station on defendant's line, and that defendant, through its agent, the conductor, unlawfully, falsely, maliciously and without reasonably probable cause, caused plaintiff to be arrested, handcuffed, and led and driven, in the day-time, through the principal street of Huntington, a long distance, to the office of a justice, on an unfounded charge, before whom he was tried on the merits, found innocent and discharged; all of which was done by defendant to plaintiff's great mental anguish, humiliation and distress, loss of time, inconvenience and expense, to his damage, etc. Defendant appeared, and demurred to the

amended declaration, and the court overruled the demurrer, and thereupon defendant pleaded not guilty. The cause was tried by a jury. The jury brought in a verdict for \$1,000 damages. Defendant moved the court to set the same aside, and award a new trial, and made various other motions, all which the court overruled, and rendered judgment, and defendant brings it here on writ of error.

On behalf of plaintiff four witnesses were examined—himself, the officer who made the arrest and W. A. Thornley and William Bell, who were present at the arrest and during the transactions which led to it. On behalf of defendant one witness was examined, viz.: the conductor of the passenger train, who caused the arrest to be made. The record sets out in full the evidence, not the facts proved. As to a large part of it, however, there is no substantial conflict, so that it can be safely said, for the present purpose, that the facts are as follows: The plaintiff, twenty-four years old, was a farmer, living in Ohio, nine miles from Gallipolia, but for a short time preceding September 17, 1889, had been working for Thornley, at a saw-mill, in Cabell county, W. Va. On that day he came into Huntington, bought a railway ticket from defendant for Greenbottom depot. He had an uncle living in Huntington, and before starting received a letter from home, stating that his mother was sick. Thereupon decided to go on up to Ben Lomond station, and bought from defendant a ticket for that place. He then went back to the depot, some forty minutes before the schedule time for his train to start, Thornley being with him. The train was standing on the side track, about thirty-five yards above the depot. It was raining very hard, and they walked across the track, and got on the coach; but finding it locked, they stood on the platform until it was unlocked, when they went in and sat down in the smoking-car, as Thornley was smoking. The conductor and brakeman were on the train when plaintiff got on. When Gillingham, the plaintiff, and Thornley got on the platform, they were followed on to it by one Coffey, a young man, very perceptibly intoxicated at the time. Plaintiff was entirely sober, not having drank any thing intoxicating that day, being orderly and well-behaved as well as sober, making no disturbance of any kind during the whole transaction. But Coffey commenced kicking or pounding on the door, when the con-

ductor went to the door, saw Coffey standing at the far side. Coffey looked and acted as if very drunk. Thereupon the conductor put his hand on Coffey's shoulder, and said: "Young man, you ought not to go on the cars this way. You might get hurt or killed, and then I would be responsible for it." Coffey then put his hand down into his pocket, and drew out an open knife, with a blade three or four inches long. The conductor stepped back into the car, picked up a coupling-pin, went to shut the door, when Coffey raised the knife a second time. The conductor hit him on the knuckles with the pin, and he (Coffey) threw the knife "down like." The conductor told him to get off the train, or he would throw the pin at him, and picked it up for that purpose, but refrained; but at the depot sent the baggage-master for a police officer. Witness Beatty, the policeman, came, when the conductor told him to arrest a man who was in the smoking-car, who he was afraid would do him some harm. The policeman, conductor and another passed out of the baggage-car into the smoking-car, and there they found plaintiff, Gillingham, seated, Thornley, smoking, sitting behind him on the same seat with Coffey, Coffey having his head leaning on the back of plaintiff's seat. The conductor pointed out plaintiff, and directed the policeman to arrest him. The policeman asked the conductor, "Are you sure that is the man?" The conductor said he was, and that he had a knife. The policeman then ordered plaintiff to stand up and take out his knife and the conductor came up and said he recognized the knife, and plaintiff handed it to the policeman, and, pointing to Coffey, on the next seat behind, said, "It was not me, but that man." The policeman, raising Coffey's head off the seat, asked Coffey what was the matter with him. Thornley also then said Coffey was the man and, Beatty, the officer, thinking there must be something wrong, and that the conductor was mistaken, again asked him if plaintiff was the man, and the conductor told him he was sure he was the man, and to take him, and hold him until he came back. Then the policeman put handcuffs on plaintiff, and started with him. Thornley went out on the platform, and again told them plaintiff was not the man. The policeman led plaintiff through the street, with the handcuffs on, first to his uncle's, James Gillingham, and then to the office of the justice, and the conductor moved out with the train.



The justice tried the case on the merits, acquitted the prisoner, and discharged him. Plaintiff did not look like Coffey in dress, size or otherwise. Plaintiff was sober, quiet and well-behaved. Defendant asked the conductor as its witness, "Was the act of your pointing out the man as the one who had committed the assault upon you a personal one?" He answered, "It was personally done." He further said: "Plaintiff had done nothing that he knew of in violation of the rules of the defendant company, had done nothing against its property, and that he himself was off duty as conductor when the arrest was made; he thought, and that he honestly believed that plaintiff was the man who cut at him with the knife."

The defendant, as a common carrier of passengers, was bound to treat the plaintiff, as one of its passengers, respectfully, and carry him safely to Ben Lomond — the point his ticket called for. "Among the obligations which such a contract imposes are to protect the passenger against any injury from negligence or willful misconduct of its servants while performing the contract, and of his fellow passengers and strangers, so far as practicable; to treat him respectfully, and to provide him with the usual accommodations, and any information and facilities necessary for the full performance of the contract on the part of the carrier. And these obligations continue to rest upon the carrier, its servants and employes, while such contract continues and is in process of performance." *Dwinelle v. Railroad Co.*, 24 N. E. Rep'r, 319; 44 Amer. & Eng. R. Cas. 384-386 (1890), and cases cited on page 386. In *Harris v. Nicholas*, 5 Munf. 483 (decided in 1817), it is stated that "an employer or master is, in general, not responsible for a willful and unauthorized trespass, committed by his agent, overseer or servant." But in *Crump v. Mining Co.*, 7 Gratt. 352 (decided in 1851), it was held that the principals are bound by the false representations of the agent, though they neither authorize them nor were informed of them.

In *Tracy v. Cloyd*, 10 W. Va. 19, Haymond, J., in delivering the opinion of the court, refers to the case of *Harris v. Nicholas*, cited above, and also to Judge Story's work on Agency. But the point was not involved and not decided. And in *Harris v. Nicholas* it was only held that, where the act of the servant or agent was neither authorized by his principal nor committed in

the usual course of his duty as such, the master was not liable. "The general maxim of the law, subject to only a few exceptions, is that whatever a man *sui juris* may himself do he may do by another, which is expressed by the maxim *qui facit per alium facit per se*." 1 Minor Inst. 225; 1 Bl. Comm. 429 (see editor's notes on this); 1 Hammond's Bl. Comm. 719. See note 1 to section 451 of Greenough's edition of Story on Agency, who contends that it is service, and not agency, which makes the master liable for his servant's torts. However this may be, the modern doctrine is well settled that "that which the superior has put the inferior in motion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person. The maxim covers acts of omission as well as of commission, and embraces all cases in which the failure of the servant to observe the rights of others in the conduct of the master's business has been injurious" (Cooley Torts, 534), as well as those cases in which the servant has failed to perform, refused to perform, or has negligently performed, the duties due from the master to others in the conduct of such business; and the master is primarily liable to others for his own negligence in employing servants who are wanting in the requisite care, skill or prudence for the business intrusted to them, when, by the exercise of ordinary care, it would have been known; and in regard to passengers whom the carrier has bound itself to carry safely, whether such want of care, skill and prudence could have been ascertained or not; for, between the two, the carrier, who has made the wrong possible, though innocent in other respects, must pay the damage or suffer the loss. But what the servant thus does without authority must be done in the master's service; must be in the line or within the scope of his employment. Masters "are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them." Lord Kenyon, C. J., in *Ellis v. Turner*, 8 T. R. 531, 533, as quoted in Bishop on Non-Contract Law, § 612. "So, when a railway company puts a conductor in charge of its train and he purposely and wrongfully ejects the passenger from the cars, the railway company must bear the blame and pay the damages. As between the company and the passenger, the right

of the latter to compensation is unquestionable." Cooley Torts (2d ed.), p. 626, and cases cited. Why? Not because the company authorized it expressly or impliedly, but because it was the duty of the company to treat him properly, and carry him safely; and it makes no difference what was the conductor's motive for doing the act, how exclusively personal it may have been, or how foreign to the master's business then in hand, of transporting the passenger, if the act was in violation of the master's duty to the passenger, which it was the conductor's duty to discharge and perform as the master's servant and in the master's place. And the same principle applies to other acts in the same circumstances, such as assault and battery. *Stewart v. Railroad Co.*, 90 N. Y. 588; *Bryant v. Rich*, 106 Mass. 180; *Railroad Co. v. Flexman* (Ill.), 8 Amer. & Eng. R. Cas. 354; *Railway Co. v. Savage* (Ind. Sup.), 9 N. E. Rep'r, 85. See *Thomp. Carr.*, notes to *Pendleton v. Kinsley*, p. 363. *Harris v. Railroad Co.*, 35 Fed. Rep'r, 116, was a case of false imprisonment. See case of *Corbett v. Railway Co.*, 42 Hun, 587 (1886)—also a case of assault and false imprisonment. Mechem, in his work on Agency, section 740, gives the general rule as follows: "While, as has been seen, it is well settled that the principal is liable for the negligent act of his agent committed in the course of his employment, it has been held in many cases that he is not liable for the agent's willful or malicious act. In the language of Judge Cowen, which fairly states the doctrine of these cases, 'the dividing line is the willfulness of the act.' *Wright v. Wilcox*, 19 Wend. 345. The tendency of modern cases, however, is to attach less importance to the intention of the agent, and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the willful or malicious acts of the agent if they are done in the course of his employment, and within the scope of his authority; but that the principal is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority—as, where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own." See cases cited. Such seems to be the present modern doctrine as to

passenger carriers, and founded upon public policy, if not upon the principle already stated.

"False imprisonment is any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere." Bish. Non-Cont. Law, § 206, and cases cited. "False imprisonment is a wrong akin to the wrongs of assault and battery and consists in imposing by force or threats an unlawful restraint upon a man's freedom of locomotion. *Prima facie*, any restraint put by fear or force upon the action of another is unlawful and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment." Cooley Torts, 196. "An abuse of a lawful arrest is also false imprisonment, as cruelly treating the arrested person, insulting him, imposing on him undue hardships." Bish. Non-Cont. Law, § 210. "In false imprisonment proper, as distinguished from malicious prosecution, malice is not required" *Id.*, § 212); but want of reasonable and probable cause is sufficient. "When the officer, acting however honestly, arrests the wrong person, not being misled thereto by the person himself it is a case of false imprisonment." *Id.*, § 213. The mistake may be shown in mitigation of damages. See cases in note.

We have seen that it is the duty of the common carrier of passengers to treat his passengers properly and respectfully, and to carry them safely, and, though not an insurer, yet the law, based upon principles of public policy, is strict and exacting in requiring their performance; and surely in this day, when all the world is carried to and fro daily by instrumentalities vast in power and force and, without constant vigilance and great care and skill, almost as dangerous as forceful, owned by mere corporate entities, public policy is not likely to exact any less stringent rule. The carrier is not only bound to safely carry and properly treat the passenger, but, as far as may be, to keep an orderly and well-regulated house, for such in fact it is in these days, "protecting the passengers from the assaults of fellow-passengers or trespassers during the subsistence of the contract of transportation." *Railway Co. v. Hinds*, 53 Penn. St. 512; *Thomp. Carr.* 295, and notes. See, also, opinion of Shaw, C. J., in *Com. v. Power*, 7 Metc. (Mass.) 596-601, citing *Markham v. Crown*, 8 N. H. 523. And to enable the company to discharge these duties the more efficiently through its conductor, put as a living, intelligent person to act as its representative in the

flesh for that purpose, our statute has enacted that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of such train" (§ 31, chap. 145, Code, p. 906 [ed. 1891]), thus giving him as conductor the shield and protection as well as the authority and power of the state in keeping and enforcing law and order, and protecting persons and property. This is a great thing for him, for his company, for his passengers, for the public at large. For him, not only because he can, in the discharge of his various and often perplexing duties, now speak and act with more confidence with the state at his back, but, as such conservator of the peace, may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made with reasonably probable cause for belief, he will be excused, even though it appear afterward that in fact no offense had been committed. See Cooley Torts, 202. For the corporate master and owner, not only for these reasons, but for the superadded one that its duties to its passengers, its servants and the public can now be more efficiently performed through its living representative, put in charge for the purpose, as well as making more safe and secure its widely-extended property. For the passengers, because their safety and well-being can be better guarded. And for the state, as interested in the preservation of law and order, as well as in all these things. But there is nothing to indicate that it was the intent of the law-making power to slacken the vigilance, or diminish the responsibility of the common carrier, or render it less liable for failure to discharge its duties than before.

Now, returning to the facts, there is little or no conflict in the evidence, and I have given them with some minuteness, and, so far as the conductor details them, pretty much in his own language. We find that, as matter of fact, he had taken charge of the train as such conductor, whether the thirty minutes had fully run out or not. He was on the train, acted and spoke as the one in charge, chided and cautioned Coffey for his drunkenness, had the doors opened, received passengers, and made ready to start, in the mean time sending a subordinate for the police officer to make the arrest. In truth it is said for his defendant company, if not by himself, as matter of complete exculpation of the master, that he was act-

ing as a conservator of the peace under the statute, and, therefore, could not be acting in any other capacity. He could only be such conservator, as a superadded function to that of "conductor of a railroad train, while in charge of such train." He caused to be arrested and handcuffed, and led through the streets of Huntington, in the open light of day, without any reasonable or probable cause, a sober and orderly and well-behaved young man, on the train as a passenger, who, as he now says, as another ground of defense for his principal, had in his own language done nothing in violation of the rules of the Ohio Railroad Company; done nothing against the property of the company, but had bought his ticket, was quietly seated on the train waiting for it to carry him to Ben Lomond, and it was the duty of the defendant to cause that to be done safely and properly, as it had contracted to do, and it cannot escape liability by laying the fault on its servant. In *Craker v. Railroad Co.*, 36 Wis. 657 — a suit for an assault committed by the conductor on a lady passenger — the same defense was made as is set up here — that it was the unauthorized and purely personal act of the conductor, and not within the scope of his employment. Ryan, C. J., in delivering the opinion, among other things, said: "And is the appellant here to contend that it has no responsibility for the flagrant violation of the contract, which the respondent paid it to make and to keep by its sole representative appointed to keep it on its behalf? Like the English crown, it lays its sins upon its servants, and claims that it can do no wrong. We cannot bend down the law to such a convenience. The appellant tortiously broke this contract as surely as it made it, committed this tort as surely as it made the contract." The willfulness of the servant's act is no excuse so long as it amounts to a breach of the contract (*Weed v. Railroad Co.*, 17 N. Y. 362); nor the fact that the act is wholly disconnected from his duties, and a purely wanton assault. In *Railroad Co. v. Finney*, 10 Wis. 330, the court held "that the proper rule was that, where the misconduct of the agent caused a breach of the obligation or contract of the principal, the principal would be liable, whether such conduct be willful or malicious or merely negligent." There are many other cases to the same effect, which need not be here cited, for here the wrong complained of was clearly in the line of service. It was done by the servant in those things that related to his duty

under the master, and was not the "servant's independent tort, committed outside the sphere of his employment." See Bish. Non-Cont. Law, § 635. Personal liberty is a natural right. "And, *prima facie*, any restraint put by fear or force upon the actions of another is unlawful, and constitutes false imprisonment, unless a showing of justification makes it a true or legal imprisonment." Cooley Torts, 196.

In this case the innocence of the plaintiff is shown beyond all question, not only by a trial and acquittal, but by the same evidence given under oath by Thornley and others which was given by him and others without oath to and in the presence of the conductor and police officer before and at the time they were making the arrest, now reinforced by the evidence of the conductor himself; and it must be remembered that Thornley had long known and knew well both plaintiff and Coffey, and was present with the two from the beginning of the difficulty between the conductor and Coffey down to the time plaintiff was led away out of the car under arrest. The conductor says he was so much excited that he could not use his ordinary prudence and carefulness, and thus made the mistake. That he did it by mistake, I think there can be no question. What motive could he have had to treat his passenger, Gillingham, in that way? None whatever, so far as this record discloses. But if he had listened at the time to those who knew, or had used ordinary care to examine for himself, or had taken the hint given him by the officer that he was acting rashly, and making a grave mistake, none would have been made; he would soon have come to his senses. But from some cause he failed to do this, and his mistake was not innocent in the eyes of the law, and the arrest was made without any reasonable or probable cause, of a passenger, whom it was the company's contract duty to carry safely to the destination mentioned in his ticket, for which very purpose, among others, he was put in charge of the train, so that the act, although in violation of his duty to the carrier as well as to the passenger, was clearly within the scope of his employment, and, therefore, the master is liable.

The jury fixed the damages at \$1,000, and the trial court refused to disturb the finding. But defendant, by its counsel, claims that the damages estimated should have been limited to the actual money loss sustained by plaintiff for loss of time and actual

expenses incurred by him in consequence of his having been put off the train, and that the jury should have been told that they could not give exemplary, vindictive or punitive damages—terms often used indifferently in describing these damages. The exigencies of the case in hand do not call for any critical examination of the subject. For that I refer to the full and able discussion of the subject by the late Judge Green in *Pegram v. Stortz*, 31 W. Va. 220 ; 6 S. E. Rep'r, 485, also published in 7 Amer. & Eng. Enc. Law, 448, under the head of "Exemplary Damages." "Exemplary damages is the money given to the plaintiff by the jury as compensation for the injury inflicted by the defendant on the mental feelings of the injured person, such as his shame, degradation, loss of social position and the like, resulting from the tort for which the action is brought." 7 Amer. & Eng. Enc. Law, 448. And in actions of tort, when gross fraud, malice or oppression or any wanton, willful and deliberate disregard of the injured person's rights, appears, the jury are not bound to adhere, in computing it to the determinable money loss or damages, but may give such damages as will be exemplary in keeping others from so doing, and the defendant from repeating like conduct. It may be smart-money as to the defendant, provided it be not an excessive or unreasonable *solatium* to the plaintiff. See 1 Sedg. Dam. (8th ed.), chap. 11. In this case the plaintiff passenger, entitled to proper and respectful treatment, was surely entitled to exemplary damages for the great indignity and humiliation to which he was subjected in being arrested, handcuffed and led away without the slightest pretext or cause for it whatever, except that the conductor persisted in closing his eyes and shutting his ears to those who knew and both showed him and told him, the real offender.

These were the main questions. Others, however, were raised and discussed, which should not be passed by. I need not give the amended declaration. It was in tort for false imprisonment and malicious prosecution, with the usual inducement of the circumstances, including the contract for transportation, and the demurrer was properly overruled.

The court, at the request of defendant, directed the jury to find in writing upon three particular questions of fact submitted to them under section 5, chapter 131, of the Code: (1) "Was the



arrest of Gillingham the result of an assault with a knife in the hands of one Coffey made upon Ebert (the conductor) while the train was upon the side track, before backing down to the depot for departure?" To this the jury answered, "Yes." This question was immaterial. If true, it was no bar. It constituted no complete defense; and, therefore, not being inconsistent with the general verdict of guilty, it could not control the latter, and the court could not accordingly give a judgment on it. (2) Question No. 2 was the same in substance, under a slightly different form, and was answered in the same way, and was properly disregarded by the court in giving judgment, and for the same reason. (3) "Did Ebert (the conductor) have any authority from the defendant company to cause Gillingham's (the plaintiff's) arrest; and, if so, how, when and by what official of said company was Ebert authorized to cause said arrest?" The jury answered, "Yes; from the Ohio River Railroad Company;" not giving the name of any special official, or the manner or the time of conferring such special authority. As we have already seen, no special authority from any official was needed. The liability of the company grew out of its obligation to answer for any injury inflicted upon the passenger by the willful misconduct or negligence of its servant, who was put in charge of the train for the purpose and with the duty of carrying the passengers safely. This special question also was, therefore, immaterial, and, if it had been answered as to the special official with a "No" instead of a "Yes," it would still have been the duty of the court not to permit it to control the general verdict. *Kerr v. Lunsford*, 31 W. Va. 659; 8 S. E. Rep'r, 493; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.*, 34 W. Va. 155; 11 S. E. Rep'r, 1009, and the discussion of the subject and authorities cited by Lucas, J., in delivering the opinion of the court; and *Peninsular, etc., Manuf'g Co. v. Franklin Ins. Co.*, 14 S. E. Rep'r, 237 (decided at this term).

Various exceptions were taken by defendant during the progress of the trial. One was permitting testimony to go to the jury of what occurred to the plaintiff after he was arrested and removed from the car. Plaintiff, as a witness, states in substance that the officer, Beatty, took plaintiff by way of Beatty's house to the office of Squire Taylor, where he was tried and acquitted. To that evidence I see no objection. When the conductor was on the

stand as a witness for defendant counsel for defendant several times asked the witness for whom he was acting when he pointed plaintiff out to the police officer as the one to arrest, and whether or not this was a personal matter between the witness and the plaintiff; whether he was acting in his own behalf or in his official capacity; and, if any, what, authority he had for arresting or causing plaintiff to be arrested; or whether he was then acting within the scope of his authority as conductor of that Ohio River train; all of which the court for a while steadily refused to permit to be answered. But the court, during the trial, did permit the witness to answer that there was no solicitation from any one to make the arrest, "only himself;" that his pointing out plaintiff, etc., "was personally done;" that he "was off duty at the time the arrest was made;" "that he honestly believed that Gillingham was the man that cut at him with the knife when he pointed him out to the policeman." These questions and answers were permitted to go to the jury, being substantial answers to the questions before ruled out, so that we need not, at this point at least, consider these exceptions further.

Two instructions were given on motion of plaintiff—No. 1 and No. 2. Seven were asked for by defendant. Nos. 1, 2 and 4 were given, and Nos. 3, 5, 6 and 7 were refused. Instructions given on motion of plaintiff were as follows: "No. 1. The court instructs the jury that if they believe from the evidence that the plaintiff without just cause was arrested after he became a passenger on one of the defendant's trains, and during the time that he was on such train, either by the conductor in charge of said train or by the policeman, Beatty, by order of the said conductor, that the act of the conductor, or of the said policeman acting under the orders of the said conductor, was the act of the defendant. No. 2. The court instructs the jury that, if they find the defendant guilty, they are, in estimating the plaintiff's damages, at liberty to consider the expense and loss of time, if any, incurred by the plaintiff; also the bodily and mental pain and anguish resulting from the defendant's acts as proved; and for the outrage and indignity and humiliation put upon the plaintiff to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injuries sustained, not exceeding the amount sued for." Instructions on behalf of defendant,

granted by the court, are as follows: "No. 1. The court instructs the jury that the plaintiff cannot recover in this case unless the acts done by Ebert in causing the arrest of the plaintiff were within the scope of his employment by the defendant railroad company; and such acts, to be within the scope of his employment, must be such as he would be usually and naturally called upon to do while discharging his duties as a railroad conductor in and about the business of the defendant railroad company. No. 2. The court further instructs the jury that it is not sufficient that the acts complained of were done during the time of the conductor's employment by the railroad company, or at the place where his duties called him to be.

"There must be something more, something which he was authorized by the defendant company to do, or which he did do while acting as such conductor, in the scope of his duties and employment." "No. 4. That, unless the act done by the conductor in causing the arrest of the plaintiff was authorized by the railroad company, or was properly and legitimately within the scope of his employment, you must find for the defendant." Instructions asked for by defendant, but refused by the court, were as follows: "No. 3. The fact that Ebert was employed by the defendant as a conductor of the passenger train upon which the plaintiff intended traveling is not sufficient evidence that he was authorized or employed to do the acts complained of, nor is that fact of itself sufficient to make the defendant liable for the acts complained of." "No. 5. That, if you believe from the evidence in this case that Ebert caused the arrest of the plaintiff while acting for himself, and upon his own authority, for his own personal safety, without any direction or authority from the railroad company for so doing, you must find for the defendant. No. 6. The court instructs the jury that it was not lawful for the policeman to make the arrest without a warrant therefor, and that the defendant railroad company could not have legally procured the plaintiff's arrest in the manner in which said arrest was made, and that the defendant is not liable for the acts of Ebert which said company itself could not have lawfully done. No. 7. The court instructs the jury that, if they believe from the evidence in this cause that the plaintiff is entitled to recover any thing, then, in estimating the damages, you are limited to the

actual damage sustained by the plaintiff for loss of time and actual expenses incurred by him in consequence of his having been put off of the train, and you cannot, in this case, give exemplary, vindictive or punitive damages." I can see no objection to the instructions No. 1 and No. 2, given on behalf of plaintiff, if read in connection with No. 1, No. 2 and No. 4, given on behalf of defendant, of which there is no complaint. They are in harmony with, and substantially propound, the law, as we think, correctly. Plaintiff's No. 2 was approved in *Ricketts v. Railway Co.*, 33 W. Va. 433; 10 S. E. Rep'r, 801. They mean that if plaintiff was a passenger on defendant's train, and during the time he was on the train to be carried to his proper station on the road he was arrested or caused to be arrested without just cause by the conductor in charge of the train, and that such act was within the scope of the conductor's employment, then such arrest would be the act of the defendant; that is, an act for which it might be liable. No serious objection can be made to instruction No. 2, given for plaintiff. It is drawn on the theory of exemplary damages as a *solatium*—damages restricted to what would, in the opinion of the jury, be a fair and just compensation for the injuries sustained or inflicted. *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. Rep'r, 485. Instruction No. 3 of defendant was virtually given in giving defendant's instructions No. 1, No. 2 and No. 4, so that, whether right or wrong, defendant has no ground of complaint in its refusal. The same may be said of instruction No. 5, asked by defendant. It had already been given, and no complaint in this court is made by plaintiff. Defendant's instruction No. 5, taken as a whole, is not correct, for if the arrest could not lawfully be made or caused to be made by the conductor without a warrant, that might add to the wrong, but would not relieve the defendant from liability for the false and groundless imprisonment of a passenger by the conductor in charge of the train, acting within the scope of his employment. The refusal of defendant's instruction No. 7 has already been disposed of by what has been said on the subject of damages and in discussing plaintiff's instruction No. 2. In conclusion, we see no reason why we should set aside the judgment and verdict and award a new trial. The judgment complained of is affirmed.\*

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\* Reported in 14 S. E. Rep'r, 243.

**Railroad companies — liability for false imprisonment of passenger caused by servant of company.**—In *Mulligan v. New York, etc.*, R. Co. 129 N. Y. 506; 29 N. E. Rep'r, 952, the defendant's ticket agent, acting under a notice given him by police officials to look out for a five-dollar counterfeit, and describing three men passing the same, supposing a bill presented at his window by plaintiff in payment for tickets to be one of the counterfeits, and supposing plaintiff and his companion to be the persons described, after giving plaintiff his tickets and change, sent for a police officer, and directed their arrest, while they were seated on the station platform waiting to take the next train. The officer stated that he knew the two men as reputable men, and that there must have been a mistake, but the agent insisted upon their arrest for passing counterfeit money, and they were arrested, but were, after an hour, discharged, the bill passed being pronounced genuine. Held, that the agent was acting without the line of his duty in taking the bill which he supposed to be counterfeit, and causing the arrest; and, it not appearing that plaintiff was at the time of his arrest in the agent's custody, or under his protection, with respect to the execution of the contract of transportation, defendant could not be made liable for his conduct. *Earl and Finch, JJ.*, dissenting.

The liability of the carrier for injuries willfully inflicted by its servants or by a fellow passenger, presents an analogous question and is passed upon in the following cases: *Dwinelle v. New York Central, etc.*, R. Co., 2 Am. R. R. & Corp. Rep. 492; *Savannah, etc., R. Co. v. Bryan*, 8 Am. R. R. & Corp. Rep. 584; *Mullan v. Wis. Cent. R. Co.*, ante, p. 19.

### CHAFFEE COUNTY V. POTTER.

(Supreme Court of the United States, Jan. 4, 1892.)

1. **MUNICIPAL BONDS. ISSUE BEYOND CONSTITUTIONAL LIMIT. RECITALS. BONA FIDE HOLDER.** Certain county bonds issued under Act of Colorado, February 21, 1881, recited that all the requirements of the act had been fully complied with; that the issue was authorized by the vote of a majority of the qualified electors voting at a general election, and that the whole amount of the issue did not exceed the limit of indebtedness prescribed by the constitution. The bonds themselves afforded no data from which the total amount of the issue was ascertainable. Held that, as against a *bona fide* holder, the county was estopped by the recitals from questioning the validity of the bonds on the ground that the percentage of indebtedness allowed by the constitution was exceeded.

IN error to the circuit court of the United States for the district of Colorado. Action by Andrew Potter against the board of county commissioners of Chaffee county, Colorado. Judgment for the plaintiff Defendant brings error. Affirmed.

*Thomas Macon* for plaintiff in error. *Willard Teller* for defendant in error.

Mr. Justice LAMAR delivered the opinion of the court.

This was an action by Andrew Potter, a citizen of Massachusetts, against the board of county commissioners of Chaffee county, Colorado, on a large number of interest-bearing coupons attached to certain bonds issued by that county, in 1882, for the purpose of funding its floating indebtedness.

The following is a copy of one of the bonds and coupons :

"No. —. \$1,000. United States of America, County of Chaffee, State of Colorado. Funding Bond. (Series A.) The county of Chaffee, in the state of Colorado, acknowledges itself indebted and promises to pay to — or bearer one thousand dollars, lawful money of the United States, for value received, redeemable at the pleasure of said county after ten years, and absolutely due and payable twenty years from the date hereof, at the office of the treasurer of said county, in the town of Buena Vista, with interest thereon at the rate of eight per cent per annum, payable semi-annually on the 1st day of March and the 1st day of September in each year, at the office of the county treasurer aforesaid, or at the banking-house of Kountz Brothers, in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally become due. This bond is issued by the board of county commissioners of said Chaffee county, in exchange at par for valid floating indebtedness of the said county, outstanding prior to August 31, 1882, under and by virtue of, and in full conformity with, the provisions of an act of the general assembly of the state of Colorado entitled 'An act to enable the several counties of the state to fund their floating indebtedness,' approved February 21, 1881, and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue does not exceed the limit prescribed by the constitution of the state of Colorado, and that this issue of bonds has been authorized by a vote of a majority of the duly-qualified electors of the said county of Chaffee voting on the question at a general election duly held in said county on the seventh day of Novem-

ber, A. D. 1882. The bonds of this issue are comprised in three series, designated 'A,' 'B,' and 'C,' respectively, the bonds of series A being for the sum of one thousand dollars each, those of series B for the sum of five hundred dollars each, and those of series C for the sum of one hundred dollars each. This bond is one of series A. The faith and credit of the county of Chaffee are hereby pledged for the punctual payment of the principal and interest of this bond. In testimony whereof the board of county commissioners of the said county of Chaffee have caused this bond to be signed by their chairman, countersigned by the county treasurer, and attested by the county clerk under the seal of the county, this 1st day of December, A. D. 1882. —, Chairman Board of County Commissioners. Attest: —, County Clerk. [County Seal.] Countersigned: —, County Treasurer."

"\$ — (Conpon.) \$ —.

"The county of Chaffee, in the state of Colorado, will pay the bearer — dollars at the office of the county treasurer, in the town of Buena Vista, or at the banking-house of Kountz Brothers, in the city of New York, on the 1st day of —, being six months' interest on funding bond. No. —, Series —. E. B. Jones, County Treasurer."

The plaintiff, as the holder of a large number of the coupons of each series, alleged in his declaration that all the proceedings required by the statutes of the state to be taken in the matter of the issue and registration of the bonds had been taken before the bonds were put on the market; that the bonds were, therefore, legal in all respects as valid obligations of the county, and that, as the *bona fide* holder for value of the interest coupons, he had presented them for payment at the place required, and payment had been refused. Wherefore he prayed judgment for the amount of said coupons, with interest; in all, \$9,648.

The defenses set up in the answer were that the bonds had not been authorized by a vote of the qualified voters of the county, and no bonds had been authorized to be exchanged for the warrants of the county, and the board, therefore, never had any jurisdiction to issue them; that the bonds, and each of them, were issued in violation of section 6, article 11, of the constitution of the state, and the debt which they assumed to fund was contracted in violation of said provision of the constitution; and

that the bonds were issued by the board of county commissioners without any consideration valid in law, as plaintiff well knew when he received the coupons sued on.

A demurrer to the answer, on the ground that it was not a sufficient defense to the action, was sustained by the circuit court, and the defendants electing to stand by their pleading, judgment was entered in favor of the plaintiff for the full amount of his claim, with interest. 33 Fed. Rep'r, 614. This writ of error is prosecuted to review that judgment.

The ground upon which the circuit court based its decision and judgment was that the county should be estopped, by the recitals in the bonds, from pleading the defenses set up in the answer.

The act of the Legislature under the authority of which the bonds were issued is set out in the margin.\* It is the same act

\* SECTION 1. It shall be the duty of the county commissioners of any county having a floating indebtedness exceeding \$10,000, upon the petition of fifty of the electors of said counties [county], who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish, for the period of thirty days, in a newspaper published within said county, a notice requesting the holders of the warrants of such county to submit, in writing, to the board of county commissioners, within thirty days from date of the first publication of such notice, a statement of the amount of the warrants of such county, which they will exchange at par and accrued interest for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such board of county commissioners, at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforementioned, upon the petition of fifty of the electors of such county who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county who shall have paid taxes on property assessed to them in said county in the preceding year the question whether the board of county commissioners shall issue bonds of such county, under the provisions of this act, in exchange, at par for the warrants of such county issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a special election, which they are hereby empowered to call for that purpose, at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish, for the period of at least thirty days immediately preceding such general or special election, in some newspaper published within such county, a notice that such question will be submitted to the duly-qualified electors as aforesaid, at such election. The county treasurer of such county shall make out and cause to be delivered to the judges of election, in each election precinct in the county, prior to the said election, a certified list of the tax-payers in such county who shall have paid taxes upon property assessed to them in such county in the



under which certain bonds were issued by Lake county, Col., which bonds were under consideration in *Lake Co. v. Graham*, 130 U. S. 674; 9 Sup. Ct. Rep'r, 654. The bonds in that case were

preceding year; and no person shall vote upon the question of the funding of the county indebtedness unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the floating county indebtedness shall be for the funding of such indebtedness, the board of county commissioners may issue to any person or corporation holding any county warrant or warrants issued prior to the date of the first publication of the aforementioned notice coupon bonds of such county in exchange therefor, at par. No bonds shall be issued of less denomination than \$100, and, if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent per annum. The interest to be paid semi-annually, at the office of the county treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the county, after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same, and made a part of the records of the county; and any bond issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond.

§ 2. All bonds which may be issued under the provisions of this act shall be signed by the chairman of the board of county commissioners, countersigned by the county treasurer of the county, and attested by the clerk of said county, and bear the seal of the county upon each bond, and shall be numbered and registered in a book kept for that purpose by the county treasurer, in the order in which they are issued; each bond shall state upon its face the amount for which the same is issued, to whom issued and the date of its issuance.

§ 3. The county commissioners shall be authorized to prescribe the form of such bonds, and the coupons thereto, and to provide for the half yearly interest accruing on such bonds actually issued and delivered. They shall levy annually a sufficient tax to fully discharge such interest, and for the ultimate redemption of such bonds they shall levy annually, after nine years from the date of such issuance, such tax upon all the taxable property in their county as shall create a yearly fund equal to ten (10) per cent of the whole amount of such bonds issued, which fund shall be called the "redemption fund." And all taxes for interest on and for the redemption of such bonds shall be paid in cash only, and shall be kept by the county treasurer as a special fund to be used in payment of interest on and for the redemption of such bonds only; and such taxes shall be levied and collected as other taxes.

§ 4. It shall be the duty of the county treasurer, when there are sufficient funds in his hands to the credit of the redemption fund, to pay in full the

quite similar to those now under consideration, differing only, as regards their recitals, in this : that the bonds here contain the additional recital that "the total amount of this issue does not exceed the limit prescribed by the constitution of the state of Colorado," and do not show upon their face, as did those in that case, how many bonds were issued, or how large each series was.

The provision of the constitution of 1876, referred to both in this case and in that (art. 11, § 6), is as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county, following, to-wit: Counties in which the assessed valuation of taxable property shall exceed \$5,000,000, \$1.50 on each thousand dollars thereof; counties in

principal and interest of any such bonds, immediately to call in and pay as many of such bonds and accrued interest thereon, as the funds on hand will liquidate, as hereinbefore provided. Such bond or bonds shall be paid in the order of their number; and when any bonds or coupons issued under this act are taken up, it shall be the duty of such treasurer to certify his action to the board of county commissioners, who shall cancel the same, so that they can be plainly identified, and cause a record to be made of the same; and, when it is desired to redeem any of such bonds, the county treasurer shall cause to be published for thirty days, in some newspaper at or nearest the county-seat of the county, and in a newspaper published in the city of Denver, a notice that certain county bonds, by numbers and amounts, will be paid upon presentation, and at the expiration of thirty days such bonds shall cease to bear interest.

§ 5. All persons voting on the question as hereinbefore provided shall vote by separate ballot, which shall be deposited in a box to be used for that purpose only, and on which ballot shall be printed the words, "For funding county debt," or "Against funding county debt;" and if upon canvassing to [the] vote (which shall be canvassed in the same manner as the vote for county officers), it shall appear that a majority of all votes cast upon the question so submitted are for funding the county debt, then the county commissioners shall be authorized to carry out the provisions of this act, and the canvassing board shall certify the vote, and it shall be made part of the county records. The judges of election shall make and certify to the clerk of the county a separate list of the names of the electors voting upon the question of the funding of the county indebtedness in the order in which the ballot of the elector so voting is received, and each ballot shall be numbered in the order in which it is received, and the number recorded and [on] the said list of voters opposite the name of the voter who presents the ballot

Laws 1881, p. 85, §§ 1-5.

which such valuation shall be less than \$5,000,000, \$3 on each thousand dollars thereof; and the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years; and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided that this section shall not apply to counties having a valuation of less than \$1,000,000."

We held in that case that the county was not estopped from pleading the constitutional limitation, because there was no recital in the bonds in regard to it, and because, also, the bonds showing upon their face that they were issued to the amount of \$500,000, the purchaser, having that *data* before him, was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds, having been issued in violation of that provision of the constitution, were not valid obligations of the county. Our decision was based largely upon the ruling of this court in *Dixon Co. v. Field*, 111 U. S. 83; 4 Sup. Ct. Rep'r, 315. To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: Do the additional recitals in these bonds, above set out, and the absence from their face of any thing showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation?

In our opinion these two features are of vital importance in distinguishing this case from *Lake Co. v. Graham* and *Dixon Co. v. Field*, and are sufficient to operate as an estoppel against the county. Of course the purchaser of bonds in open market was bound to take notice of the constitutional limitation on the county with respect to indebtedness which it might incur. But

when, upon the face of the bonds, there was an express recital that that limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the Lake Co. Case and in Dixon Co. v. Field, that, as a matter of fact, the constitutional limitation had been exceeded in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment-roll whether the county had exceeded its power, under the constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds, and then compared it with the assessment-roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is, what does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in Lake Co. v. Graham and Dixon Co. v. Field. But that is not this case. Here, by virtue of the statute under which the bonds were issued, the county commissioners were to determine the amount to be issued, which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact—that is, whether the issue of bonds was in accordance with the constitution of the state and the statute under which they were issued—and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not

show such recital to be untrue, under the law, estops the county from saying that it is untrue. *Town of Coloma v. Eaves*, 92 U. S. 484; *Town of Venice v. Murdock*, id. 494; *Marcy v. Township of Oswego*, id. 637; *Wilson v. Salamanca Tp.*, 99 U. S. 499; *Buchanan v. Litchfield*, 102 U. S. 278; *Northern Bank v. Porter Tp.*, 110 U. S. 608; 4 Sup. Ct. Rep'r, 254.

The rule respecting the binding force of recitals in bonds is well stated in *Town of Coloma v. Eaves*, as follows: "Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal. 92 U. S. 491.

In *Buchanan v. Litchfield*, while holding that the bonds were in excess of the amount that could be legally issued, and that the recitals in the bonds were not sufficient to estop the municipality from pleading a want of authority to issue them, the court say: "As, therefore, neither the constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation on the part of the constituted authorities of the city that the requirements of the constitution were met — that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit — then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds. The case might, then, perhaps, have been brought within the rule announced by this court in *Town of Coloma v. Eaves*." And again: "Had the bonds made the additional recital that they were issued in accordance with the constitution or, had the ordinance stated, in any form, that the proposed indebted-

ness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not, at the time, exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement, as to the extent of its existing indebtedness." 102 U. S. 292.

We think this case comes fairly within the principles of those just cited; and that it is not governed by *Dixon Co. v. Field and Lake Co. v. Graham*, but is distinguishable from them in the essential particulars above noted. Judgment affirmed.\*

Mr. Justice Gray dissented.

**Municipal bonds.**—The following cases and notes are upon the subject of municipal and railroad aid bonds: *Brown v. Milliken*, 1 Am. R. R. & Corp. Rep. 8, and note; *Inhabitants of Bernards v. Morrison*, 2 Am. R. R. & Corp. Rep. 35; *North v. Platte County*, 2 Am. R. R. & Corp. Rep. 508; *Calhoun v. Millard*, 2 Am. R. R. & Corp. Rep. 514; *Wallenwaber v. Dunnigan*, 3 Am. R. R. & Corp. Rep. 578, and note; *Merrill v. Town of Monticello*, 4 Am. R. R. & Corp. Rep. 301, and note; *Doon Township v. Cummins*, post.

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ANDERSON ET AL. V. MIDDLE & EAST TENNESSEE CENT. R. Co.

(Supreme Court of Tennessee, Dec. 17, 1891.)

1. CORPORATIONS. SUIT TO ENFORCE SUBSCRIPTIONS FOR STOCK. CORPORATE EXISTENCE. The statutes provide that a railroad company's charter shall first be registered in the county where the company's principal office is; that it shall then be transmitted to the secretary of state, who shall affix his certificate of registration and the great seal of state, and that these shall be registered where the charter was originally registered; and that this shall complete the company's corporate charter. Held that, where a company was organized to run a railroad through several counties, the county where its charter has been so registered shall be deemed to have been determined on as the location of the principal office, and holding a directors' and stockholders' meeting in another county will not change the fact, and registration in such other counties is not essential.

2. AMENDMENT OF CHARTER HELD INVALID. Where a charter is amended so as to change the starting point of a railroad the change will not be effected unless such amendment is registered in the county where the charter was originally registered.

3. SUBSCRIPTION FOR STOCK. WAIVER OF IMPLIED CONDITION THAT WHOLE STOCK MUST BE SUBSCRIBED. Though only part of the defendant's capital stock

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\* Reported in 12 Sup. Ct. Rep'r, 218; 142 U. S. 355.

had been subscribed, and there was nothing to rebut the implied legal condition that no stock payments should be enforced until all the stock was subscribed, yet, where subscribers to stock expressly agreed, for the purpose of enabling defendant to build a certain part of its road, to pay their subscriptions, and on the strength of the agreement such part was constructed, this was a waiver of such implied condition, and made them liable on such subscriptions.

4. IF SUCH CONDITION NOT WAIVED NO ACTION CAN BE MAINTAINED ON SUBSCRIPTION. Subscribers who did not sign such agreement, nor vote to have part of the road constructed, cannot be held on their subscriptions, where only part of the stock has been subscribed.

5. FRAUD IN PROCURING SUBSCRIPTIONS. Though defendant's agents represented at the time such subscriptions were made that no calls for stock would be made until another road was built to N., and arrangements made whereby defendant's trains could be run to N. over such road, yet this would not defeat a subsequent special agreement to pay subscriptions as work on part of the road progressed.

6. PRACTICE IN CHANCERY. EXCLUDED EVIDENCE. Where a bill of exceptions in an equity case does not purport to make excluded evidence a part of the record, but simply recites that certain questions and answers, referred to by number, were objected to and excluded, it does not include such evidence.

**A**PPEAL from chancery court, Summer county, W. C. Dis-  
mukes, special judge. Bill by D. B. Anderson and others  
against the Middle and East Tennessee Central Railroad Com-  
pany to enjoin suits to enforce stock subscriptions. Defendant  
filed a cross-bill to recover on such subscriptions. Decree for  
plaintiffs. Defendant appeals. Modified.

*C. R. Head* for appellant. *J. J. Turner* for appellees.

LUTON, J. A number of subscribers to the original stock of the defendant company have joined in filing this bill for the purpose of enjoining suits at law upon their several contracts of subscription. The corporation, expressly waiving all questions of jurisdiction, answers and submits the liability of complainants to the judgment of the court, and by cross-bill seeks a recovery against each of them. The learned chancellor was of opinion that no liability existed, and perpetually enjoined suits at law, and dismissed the cross-bill. In support of this decree a number of propositions have been urged.

1. It is insisted that the defendant company has no legal existence, because its charter has not been registered in the several counties through which it is authorized to construct and operate

a line of railway. The charter of the defendant company was obtained under the general incorporation act of 1875. It was granted in 1883, and, as recited in the written parts, was "for the purpose of constructing a railway from the town of Gallatin, in the county of Sumner, to the city of Knoxville, in the county of Knox, through the counties of Sumner, Trousdale, Smith, Putnam, De Kalb, White, Cumberland, Roane and Knox, over the most direct and practical route between the said termini." This charter after registration in Sumner, was transmitted to the secretary of state, who affixed his certificate of registration in his office and the great seal of state. This certificate, together with the great seal, was subsequently registered in the county of original registration. Whether there has been any registration in any of the other counties on the projected line of road is, on the record, left in doubt. Complainants insist that until registration in these other counties, and particularly in the county of Trousdale, where work has been begun, and where directors' meetings have been lately held, the company has no valid corporate existence. By section 26 of the act of 1875 it is required that the charter shall be registered in the office of the county where the principal office of the company is situated; that it shall then be transmitted to the secretary of state, who shall affix his certificate of registration, together with the great seal of state; and that these shall be likewise registered "where said instrument was originally registered."

This section then declares that this registration shall complete the formation of the company as a body politic, and the validity of the same in any legal proceeding shall not be collaterally questioned. When these conditions of existence have been fulfilled as required, and not before, can the corporation rely upon its exemption from collateral attack. *Brewer v. State*, 7 Lea, 682. All this was done in this case. We must take the registration in the first instance as a corporate determination of the location of its "principal office." Registration in the county where its principal office is situated completes its identity as a corporation. It is true that by a subsequent clause in the same section it is provided "that, if the corporation establishes agencies in any other county or counties, the instrument must be also registered in said county." Failure to comply with this provision may subject the



corporation to a proceeding by the state for a forfeiture, but its corporate existence cannot be collaterally questioned after registration in the county of its principal office. Complainants are not in a situation to make any question as to the failure to register in Trousdale county. It is shown that, after they had subscribed, the meetings of the directors and stockholders were held at Hartsville. This cannot change the fact that the corporators determined Sumner county to be the location of the principal office. The subsequent opening of an office in that county, or the removal of the principal office, if permissible, cannot affect the character acquired by the registration in Sumner.

2. The capital stock was fixed by the corporators, at a meeting held for purposes of organization, at \$3,000,000. Something less than \$50,000 of this had been taken when this bill was filed. Complainants' contention is that, until the whole of the stock is taken, they cannot be made liable for calls on their subscriptions. It is well settled that there is an implied condition that the amount of stock specified in the charter, articles of association or contract of subscription, or fixed by the corporators when authorized to settle same, shall be actually taken before the subscribers shall become liable. *Read v. Gas Co.*, 9 Heisk. 545; *Mor. Priv. Corp.*, § 156; *Beach Priv. Corp.*, § 535. This implication may, however, be rebutted by the terms of the charter, or the provisions of the enabling act, articles of association, action of stockholders or corporation fixing capital, or by the conditions of the contract of subscription. So a subscriber may waive such condition, and this waiver may be either express or implied. A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbid the doing of any corporate act until the requisite capital is taken. *Mor. Priv. Corp.*, § 156; *Beach Priv. Corp.*, § 535, and authorities cited. There is nothing in the charter or resolution fixing the amount of capital stock, or in the original contract of subscription, rebutting the usual implied conditions, and taking their contract of subscription out of the general rule of law. But, after the original subscription had been made a majority of the subscribers entered into the following agreement: "For the purpose of enabling the Middle and East Tennessee

Central R. Co. to put their road under construction from the Chesapeake and Nashville railroad to Hartsville, Tenn., the undersigned subscribers to the capital stock of the said M. & E. T. C. R. Co. agree that they will pay their said subscriptions as fast as the work progresses, provided that not more than twenty-five per cent shall be called for in any one month." Upon the faith of this agreement the directors let out a contract for the construction of the very part of the projected line contemplated by this agreement, being eleven and one-half miles, and covering the route between the Chesapeake and Nashville road and the town of Hartsville. The contractors were shown this supplementary agreement, and upon the faith of it accepted a contract to construct so much of the road as was agreed to by that paper, and had completed about seventy per cent of the work when this suit was begun. The obvious effect of assenting to this agreement was to waive the implied condition that the whole of the stock should be raised, and was an undoubted agreement that the work should begin at the Chesapeake and Nashville railroad instead of the town of Gallatin. Some of the complainants did not sign this agreement, and are not shown to have assented, by votes or otherwise, to the commencement of work or the creation of debt. There is proof that at a meeting of subscribers it was unanimously resolved that the directors should let out a contract for that part of the line between Gallatin and Carthage, but it is not shown that the complainants who failed or refused to sign the agreement above set out in any way participated in this meeting, or that their stock was represented. We, therefore, decide that such of complainants as did not sign the agreement assenting to the beginning of work between the Chesapeake and Nashville railroad and the village of Hartsville are not now liable to have their stock called. The remainder of the complainants have expressly agreed to the beginning of construction and to the payment of their stock as work progressed, and as to them this implied condition has been waived.

3. Certain other positions remain to be considered as to those of complainants who have waived the condition that the full capital stock should be raised. It is said that the defendant company is now insolvent, and that the original scheme for a route from Gallatin to Knoxville cannot be carried out, and that the enterprise

has been dwarfed to a short link, beginning eight and one-half miles from Gallatin, and terminating at Hartsville. It is urged that the charter provided for a road beginning at Gallatin, and not at a point on the Chesapeake and Nashville road eight and one-half miles from Gallatin, and that it should terminate at Knoxville, and not at the town of Hartsville; that complainants are business men and property-owners in Gallatin, and that the scheme into which they entered contemplated a great through road, passing through the coal-fields of the Cumberland mountains, and connecting their city with other lines of railway and with the flourishing city of Knoxville. They further insist that to procure their subscriptions the officers and agents of the company represented that no calls would be made upon their subscriptions until the company had secured a contract whereby, if it should build to Carthage, it could consolidate with a road thence to Knoxville, to be built by a Mr. Crawford, and that no call should be made until the Chesapeake and Nashville road was constructed into Nashville, and a running arrangement made by which the trains of the defendant company should be carried into Nashville over the track of the Chesapeake and Nashville; that none of these things have been done, or are now possible; and that, therefore, they should not be held liable. The company, for answer to the objection as to the beginning point of the road, under construction, interpose an alleged amendment to the charter, fixing the beginning point at the Chesapeake and Nashville railroad, near Gallatin. This amendment was obtained in 1884, upon application of the directors, as provided by the act of 1875, as amended by the act of 1883, chapter 163. It was duly registered in Sumner county, but appears never to have been registered with the secretary of state. This neglect makes the amendment, even if otherwise valid, ineffectual and void. An amendment must be registered as the original, and, until this is done, is subject to the same objection which renders void a defectively-registered charter. *Brewer v. State*, 7 Lea, 682. Another amendment was obtained pending this suit, changing the termini to the Chesapeake and Nashville railroad near Gallatin, and the town of Carthage in Smith county. This amendment seems to have been in all respects properly registered. By it the capital stock was reduced to \$350,000. This reduction does not help the case, inasmuch as it is not

shown that even this has been taken, to say nothing of other objections not necessary to consider. Without passing upon the validity of this second amendment, we are of opinion that, whether valid or invalid, the complainants are estopped to question their liability as subscribers. They expressly agreed that, to enable the company to put under construction the line between the Chesapeake and Nashville railroad and town of Hartsville, they would pay their subscriptions as that work progressed, in calls of twenty-five per cent monthly. It is too late now to say that the line has not been begun at Gallatin, or that it cannot be carried beyond Hartsville. We know of no reason why this company might not have begun the work of construction at any point on the line between Gallatin and Knoxville. If its finances should prove insufficient to connect the part so constructed with the charter termini, this ought not, in law or equity, to relieve the subscribers who assented to the beginning of so great an enterprise upon so insufficient a capital.

The representations made to induce subscriptions were all made antecedent to the written contract of subscription, and upon this ground, as tending to contradict the written contract, were excluded. This ruling was doubtless correct. But, however this may be, the excluded evidence is not properly a part of the record before us. When evidence offered in a chancery cause is excluded upon objection, the correctness of the ruling cannot be challenged upon appeal unless the excluded evidence be made a part of the record by bill of exceptions. This has been repeatedly so ruled. *Steele v. Frierson*, 85 Tenn. 430; 3 S. W. Rep'r, 469; *Aymett v. Butler*, 8 Lea, 453. There is a paper in the transcript styled a "bill of exceptions," but this is not signed by the chancellor as a bill of exceptions. Whether it be a memorandum on a deposition or a decree interlocutory does not appear. But however this may be, it does not purport to make the excluded evidence a part of the record, and simply recites that certain questions and answers, referred to by numbers, were objected to and excluded. At most this can only operate to exclude, and not include, this evidence from the record. The decree of the chancellor must be reversed as to all of the complainants except Anderson, Miller and Thompson. As to them it will be modified so as to enjoin suits at law until the capital stock settled by

the incorporators has been raised. The original bill will be dismissed as to all of the other complainants. The railway company, under its cross-bill, will take a decree in accordance with the prayer of that pleading against each defendant thereto save Anderson, Miller and Thompson for the amount of their several subscriptions alleged to be due and unpaid, with interest from filing of cross-bill. One-third of the costs will be paid by defendant railway company, and remainder by defendants to cross-bill against whom decrees are rendered.\*

1. Corporations — action on note given for stock subscribed — estoppel to deny corporate existence.— Where a number of persons are associated together and are acting as a corporation under color of lawful authority as such, though their corporate organization is legally defective, a subscriber to the corporate stock, who was a promoter of the corporate organization, and who has been a party to and has acquiesced in the subsequent proceedings in incurring liabilities and issuing the stock, is also estopped to deny that the association is a corporation *de facto*, or that the stock so issued is valid in an action on a note given for the amount of his subscription. *Minnesota Gas-light Economizer Co. v. Denslow*, 46 Minn. 171; 48 N. W. Rep'r, 771. To the same effect, *Columbia Electric Co. v. Dixon*, 46 Minn. 463; 49 N. W. Rep'r, 244. See, also, *Handley v. Stutz*, 4 Am. R. R. & Corp. Rep. 482.

2. Subscriptions for stock — implied condition that all the stock must be subscribed before the subscriber is liable.— For cases sustaining this rule and as to what will constitute a waiver of it, see *Masonic Temple Assn. v. Chan-nell*, 2 Am. R. R. & Corp. Rep. 723; *International Fair, etc., Assn. v. Walker*, 3 Am. R. R. & Corp. Rep. 731. The terms of the subscription may be such as to negative or constitute a waiver of the implied condition. *Arkadelphia Cotton Mills v. Trimble*, 4 Am. R. R. & Corp. Rep. 286.

3. Fraud in procuring subscription.—In an action by a railroad company on a note given for a subscription to its capital stock, a good defense is set up by a plea that plaintiff's agents procured the subscriptions by representations that plaintiff would issue stock only to the amount of \$3,000 per mile, and bonds only to the amount of \$12,000 per mile, whereas at the time the representations were made, stock had already been issued, or agreed to be issued, to the amount of \$12,000, and bonds to the amount of \$15,000 per mile. *Weems v. Georgia M. & G. R. Co.*, 84 Ga. 356; 11 S. E. Rep'r, 503.

Where a subscription for corporate stock is obtained by the representation that a prominent business man has subscribed for a large amount, and the fact that he paid nothing for his stock is concealed, such concealment makes the representation fraudulent, and is sufficient to avoid the contract. *Coles v. Kennedy*, 81 Iowa, 360; 46 N. W. Rep'r, 1088.

But representations as to the future intention, purpose or expectation of the corporation, or the prospective value of its assets, though false or not made in good faith, will not constitute such fraud as will enable the subscriber to

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\* Reported in 17 S. W. Rep'r, 803.

avoid his contract. *Armstrong v. Karshner*, 47 Ohio St. 276 ; 24 N. E. Rep'r, 897 ; *Columbia Electric Co. v. Dixon*, 46 Minn. 463 ; 49 N. W. Rep'r, 244.

4. *Bill to cancel subscription for fraud — injunction.*—Where persons are induced to subscribe to the stock of a corporation by representations that it had a paid-up capital of a certain amount, was out of debt, and doing a profitable business, and that they would be given employment therein at specified wages, all of which representations are false, they are entitled to a decree for the cancellation of their subscription, and the return to them of the money they paid for the stock, with interest. *Sherman v. American Stove Co.* 85 Mich. 169 ; 48 N. W. Rep'r, 537. It is proper to restrain by injunction any disposition of the corporate property and the money paid for the stock pending such suit. *Id.*

## NORTHERN PAC. R. CO. v. TERRITORY OF WASHINGTON, EX REL. DUSTIN, PROSECUTING ATTORNEY.

(Supreme Court of the United States, Jan. 4, 1892.)

1. *RAILROAD COMPANIES. MANDAMUS TO ERECT AND MAINTAIN STATION AND STOP TRAINS THEREAT. GENERAL RULE AS TO GRANTING WRIT.* A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings or in running its trains can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

2. *PRACTICE. IN WHOSE NAME SUIT SHOULD BE BROUGHT IN SUCH CASE.* A *mandamus* to compel a railroad company to erect and maintain a station at a certain place, and stop its trains there for the accommodation of the public, founded upon an alleged breach of public duty required of it by law, is properly brought in the name of the state at the relation of the prosecuting attorney of the county in which the place is located.

3. *CIRCUMSTANCES HELD INSUFFICIENT TO WARRANT THE RELIEF.* Defendant railroad company, having a discretion as to the location of the route of its road, constructed its road through Y., an established county-seat, and the largest and most prosperous town in the county and along the line of the road for many miles, and stopped its trains there, but did not build a station. After completing its road four miles further, to North Y., a town laid out on unimproved lands of its own, it there erected a station, and ceased to stop its trains at Y., which resulted in a rapid increase in size of North Y. at the expense of Y., which as rapidly dwindled. On an application for a *mandamus* to compel defendant to erect and maintain a station at Y., and stop its trains there, it appeared that North Y. had become by far the most important town in the county, and that the surrounding community were better accommodated by a station at that place; that a station at Y. would not pay expenses; that there were other stations on the road furnishing sufficient facilities for the country south of North Y.; and that North Y. had been made the county-seat by act of the legislature. Held, *mandamus* being predicated upon the facts existing at the time of rendering judgment, that it was erroneously issued, the facts not bringing the case within the power of the court to grant relief.

**I**N error to the supreme court of the territory of Washington.

STATEMENT BY MR. JUSTICE GRAY.

A petition in the name of the territory of Washington, at the relation of the prosecuting attorney for the county of Yakima and four other counties in the territory, was filed in the district court of the fourth judicial district of the territory on February 20, 1885, for a *mandamus* to compel the Northern Pacific Railroad Company to erect and maintain a station at Yakima city, on the Cascade branch of its railroad, extending from Pasco junction, on the Columbia river, up the valley of the Yakima river, and through the county of Yakima, toward Puget sound, and to stop its trains there to receive and deliver freight, and to receive and let off passengers.

The Northern Pacific Railroad Company was incorporated by act of congress of July 2, 1864, chapter 217, and was thereby "authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly, by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's sound, with a branch, via the valley of Columbia river, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth." By section 5 of its charter it was enacted "that said Northern Pacific railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron; and a uniform gauge shall be established throughout the entire length of the road." And by section 20 it was enacted "that the better to accomplish the object of this act, namely, to promote the public

interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act." 13 St. 366, 368, 372.

The petition set forth at length the size and importance of Yakima city and its need of railroad accommodations; alleged that it was the county-seat of Yakima county, a county having more than four thousand inhabitants, and had a court-house where courts of the United States and of the territory were held, and a United States land-office; that the defendant had refused to establish a freight and passenger station or to stop its trains at Yakima city, but was building a freight and passenger station and stopping its trains at the rival town of North Yakima, four miles further north, which it had laid out on its own unimproved land, and was ruining Yakima city for the purpose of enhancing the value of its own town-site.

The answer, filed June 1, 1885, said nothing as to the court-house; admitted that at the time of filing the petition there was a United States land-office at Yakima city, but alleged that it had since been removed by order of the president of the United States to North Yakima; admitted that Yakima city heretofore had five hundred inhabitants, but alleged that since the construction of the defendant's railroad two-thirds of them had removed with their houses and other buildings to North Yakima, and others were continually abandoning it, and no buildings or business were replacing those taken away; denied that it had laid out the town of North Yakima for the purpose of enhancing the value of its own property, or for the purpose of injuring the property of any other person, town or city, and alleged that there was not business enough to warrant more than one station on this part of its road, and that North Yakima was a much larger and more prosperous town than Yakima city ever was, and was a more convenient point for the people of the neighboring valleys, who were more than fifteen times as many, and had more than fifteen times as much taxable property, as the people living in Yakima city and its immediate vicinity.



The parties also made allegations and denials, and (after the filing of a replication not copied in the record) introduced evidence at the trial by a jury as to the matters afterward stated in the special verdict, which was returned October 17, 1885, in answer to forty-six questions submitted by the court, and was in substance as follows:

In January, 1885, the defendant carried freight and passengers for hire on its railroad to and from Yakima city, and kept an agent there who attended to the freight and sold tickets to passengers; but before February 20, 1885, having completed its road to North Yakima, it ceased to stop its trains at Yakima city, and established a freight and passenger station at North Yakima, and, pursuant to section 4 of its charter, tendered its road to the United States as fully completed and equipped from Pasco junction to or beyond Yakima city, and caused to be appointed by the president of the United States commissioners to examine and report on the condition of the road. On March 16, 1885, that part of its road from Pasco junction by Yakima city to North Yakima had not been turned over to the operating department of the company, but the freight and passenger trains were not run as subordinate to the construction of the road.

In January, 1885, Yakima city was the oldest and largest town, and the most important business center, on the Cascade branch of the defendant's railroad, between the Columbia river and Puget sound. On February 20, 1885, and when the defendant built and operated its road to Yakima city, the amount of business done at Yakima city annually was \$250,000, its population was five hundred and there was no other town or business center of any importance in Yakima county.

On October 17, 1885, Yakima city was the largest town and the most important business center in the county, except the town of North Yakima; the population of Yakima city was one hundred and fifty; there were seventy children attending school there; and it had two hotels, a flour-mill, thirteen stores and places of business, twenty-seven dwelling-houses, and but a limited amount of industries requiring railroad facilities. The amount of business furnished by Yakima city to the defendant over that portion of its road between Pasco junction and North Yakima in the summer of 1885 was in June sixteen thousand pounds, in July four

thousand pounds, in August none, in September two thousand four hundred pounds, in October none; and during that period no produce of Yakima city or the country adjoining was furnished by any one to be carried over the defendant's road.

There is a safe and suitable place for a freight and passenger station in Yakima city on the line of the defendant's road, and the defendant has the ability to construct and maintain such a station there, with freight and passenger facilities. If the defendant had done so, Yakima city would have retained its former size and importance. No demand was ever made upon the defendant for the establishment of a freight and passenger station there. The expense of constructing and fitting for practical use a station and warehouse at Yakima city would be about \$8,000, and of keeping the requisite agents there \$150 a month. The wear and tear and cost of stopping a train at a station is \$1.

The passenger and freight traffic of the people living in the valleys of the streams entering the Yakima river at and near Yakima city and North Yakima, considering them as a community, would be better accommodated at North Yakima than at Yakima city. There are other stations for receiving freight and passengers on that part of the defendant's railroad extending from Pasco junction to North Yakima, called "Yakima Division," furnishing sufficient facilities for all the country below North Yakima, and the earnings of that division are not sufficient to pay its running expenses.

On the verdict of the jury and the admissions in the pleadings each party moved for judgment; and on April 23, 1886, the district court ordered a peremptory *mandamus* to issue, in accordance with the prayer of the petition. The record showed that the district court during the previous proceedings in the case was held at Yakima city, but at the time of rendering judgment was held at North Yakima, to which the county-seat and the court-house had been removed pursuant to the statute of the territory of January 9, 1886. Laws Wash. Ter. 1885-86, pp. 57, 457. On appeal to the supreme court of the territory, the judgment of the district court was affirmed. 3 Wash. Ter. 303; 13 Pac. Rep'r, 604. The defendant thereupon sued out this writ of error, and assigned the following errors:

"*First.* That the proceedings were not commenced by the

proper relator, or in the name or on behalf of the real party in interest.

"*Second.* That Yakima city is the real party in interest.

"*Third.* The application and petition do not state facts sufficient to constitute a cause of action.

"*Fourth.* The findings of the jury are not sufficient to sustain, and are inconsistent with, the judgment rendered thereon by the court.

"*Fifth.* The jury found that existing depot and stations between North Yakima and Pasco furnished sufficient railroad station facilities.

"*Sixth.* The jury found affirmatively that the railroad, at the time of the application and the return thereto, was in the hands of the railroad contractors and construction department.

"*Seventh.* That the business furnished said railroad company by said Yakima city and its people, and transacted at said Yakima city by said railroad, was not sufficient to pay the running expenses of a station at said place.

"*Eighth.* The jury found that no demand whatever was ever made upon the Northern Pacific Railroad Company for the said station or other depot facilities mentioned in the said application and the judgment of said court.

"*Ninth.* No facts are found showing any necessity for other or additional stations and facilities than those already furnished.

"*Tenth.* The charter of the Northern Pacific Railroad Company vests in said company a discretionary power in reference to locating and constructing and maintaining its stations.

"*Eleventh.* That the matters set forth in the application and findings by the jury are not matters which the law specially enjoins as a duty resulting from an office, trust or station.

"*Twelfth.* That the judgment affirming the judgment of the district court rendered on the findings of the jury, and the writ thereon, are vague, uncertain and insufficient, in not directing and defining what said Northern Pacific Railroad Company was to do under said judgment and writ, especially as to the character, kind and class of station and facilities to be furnished, and requires an impossibility in this, to wit: that said station be constructed immediately."

*James McNaught, A. H. Garland and H. J. May* for plaintiff in error.

No appearance for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court. A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

If, as in *Railroad v. Hall*, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by *mandamus*. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide-water (as was held to be the case in *State v. Railroad*, 29 Conn. 538), and it has so constructed its road and used it for years, it may be compelled to continue to do so. And *mandamus* will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. *Railway v. Mississippi*, 112 U. S. 12; 5 Sup. Ct. Rep'r, 19; *People v. Railroad*, 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by *mandamus* to complete or to maintain its road to that point when it would not be remunerative. *Railway Co. v. Queen*, 1 El. & Bl. 858; *id.* 874; *Com. v. Railroad*, 12 Gray, 180; *State v. Railroad*, 18 Minn. 40 (Gil. 21).

The difficulties in the way of issuing a *mandamus* to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at or near or within convenient access to one point or another, which are more appro-

priate to be determined by the directors, or in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals.

The defendant's charter, after authorizing and empowering it to locate, construct and maintain a continuous railroad "by the most eligible route, as shall be determined by said company," within limits described in the broadest way, both as to the terminal points and as to the course and direction of the road, and vesting it with "all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth," enacts that the road "shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances." The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the discretion in these respects of a corporation intrusted with such large discretionary powers upon the more important questions of the course and the termini of its road. The contrast between these general words and the specific requirements, which follow in the same section, that the rails shall be manufactured from American iron, and that "a uniform gauge shall be established throughout the entire length of the road," is significant.

To hold that the directors of this corporation in determining the number, place and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of *mandamus*, would be inconsistent with many decisions of high authority in analogous cases.

The constitution of Colorado of 1876, article 15, section 4, provided that "all railroads shall be public highways, and all railroad companies shall be common carriers;" and that "every railroad company shall have the right with its road to intersect, connect with or cross any other railroad." Section 6 of the same article was as follows: "All individuals, associations and corporations shall have equal rights to have persons and property transported

over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employe thereof shall give any preference to individuals, associations or corporations in furnishing car or motive power." The General Laws of Colorado of 1877, chapter 19, section 111, authorized every railroad company "to cross, intersect or connect its railways with any other railway," "to receive and convey persons and property on its railway," and "to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery for the convenience, accommodation and use of passengers, freights and business interests, or which may be necessary for the construction or operation of said railway." This court held that section 6 of article 15 of the constitution of Colorado was only declaratory of the common law; that the right secured by section 4 to connect railroads was confined to their connection as physical structures, and did not imply a connection of business with business; and that neither the common law, nor the constitution and statutes of Colorado, compelled one railroad corporation to establish a station or to stop its cars at its junction with the railroad of another corporation, although it had established a union station with the connecting railroad of a third corporation, and had made provisions for the transaction there of a joint business with that corporation. Chief Justice Waite, in delivering the opinion, said: "No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited, both by the common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other cus-

tomers could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power." *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 681, 682; 4 Sup. Ct. Rep'r, 185.

The court of appeals of New York, in a very recent case, refused to grant a *mandamus* to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing one thousand two hundred inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by Judge Danforth, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose, because the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station-houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and to erect and maintain all necessary and convenient buildings and stations "for the accommodation and use of their passengers, freight and business," and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than an inquest for informa-

tion, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by *mandamus*. It cannot compel the erection of a station-house, nor the enlargement of one." "As to that, the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by *mandamus* also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation." "Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character; nor can it by any fair or reasonable construction be implied." *People v. Railroad*, 104 N. Y. 58, 66, 67; 9 N. E. Rep'r, 856.

In *Com. v. Railroad*, the supreme judicial court of Massachusetts, in holding that a railroad corporation, whose charter was subject to amendment, alteration or repeal at the pleasure of the legislature, might be required by a subsequent statute to construct a station and stop its trains at a particular place on its road, said: "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or do any way business for that reason, though the road passed for a long distance through a populous part of



the state, this would be a case manifestly requiring and authorizing legislative interference under the clause in question ; and on the same ground if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine, and their determination on this point must be conclusive." 103 Mass. 254, 258.

Upon the same principle the supreme judicial court of Maine compelled a railroad corporation to build a station, at a specified place on its road in accordance with an order of railroad commissioners, expressly empowered by the statutes of the state to make such an order, and to apply to the court to enforce it. Laws Me. 1871, chap. 204; *Commissioners v. Portland & O. R. Co.*, 63 Me. 270.

In *Railway Co. v. Commissioners*, a railway company was held by Lord Chancellor Selborne, Lord Chief Justice Coleridge, and Lord Justice Brett, in the English court of appeal, to be under no obligation to establish stations at any particular place or places unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding and delivering passengers and goods at a station once established and used for the purpose of traffic only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by act of parliament. 6 Q. B. Div. 586, 592.

The decision in *State v. Railroad Co.*, 17 Neb. 647; 24 N. W. Rep'r, 329, cited in the opinion below, proceeded upon the theory (inconsistent with the judgments of this court in *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, and of the court of appeals of New York in *People v. Railroad Co.*, above stated) that independently of any statute requirements, a railroad corporation might be compelled to establish a station and to stop its trains at any point on the line of its road at which the court thought it reasonable that it should.

The opinions of the supreme court of Illinois, though going further than those of most other courts in favor of issuing writs of *mandamus* to railroad corporations, afford no countenance

for granting the writ in the case at bar. In *People v. Railroad Co.*, 120 Ill. 48; 10 N. E. Rep'r, 657, a *mandamus* was issued to compel the company to run all its passenger trains to a station which it had once located and used in a town made a terminal point by the charter, and which was a county-seat, because the corporation had no legal power to change its location, and was required by statute to stop all trains at a county-seat. In *People v. Railroad Co.*, 130 Ill. 175; 22 N. E. Rep'r, 857, in which a *mandamus* was granted to compel a railroad company to establish and maintain a station in a certain town, the petition for the writ alleged specific facts making out a clear and strong case of public necessity, and also alleged that the accommodation of the public living in or near the town required, and long had required, the establishment of a station on the line of the road within the town; and the decision was that a demurrer to the petition admitted both the specific and the general allegations, and must, therefore, be overruled. The court, at pages 182, 183 (130 Ill., and page 859, 22 N. E. Rep'r), of that case, and again in *Railroad Co. v. People*, 132 Ill. 559, 571; 24 N. E. Rep'r, 643, said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public." But in the latter case the court also said: "The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point." Page 570, 132 Ill., and page 646, 24 N. E. Rep'r. "The rule has been so often announced by this court that it is unnecessary to cite the

cases, that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established." Page 572, 132 Ill., and page 646, 24 N. E. Rep'r. And upon these reasons the writ was refused.

Section 691 of the Code of Washington Territory of 1881, following the common law, defines the cases in which a writ of *mandamus* may issue as "to any inferior court, corporation, board, officer or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." By the same code, in *mandamus*, as in civil actions, issues of fact may be tried by a jury; the verdict may be either general or special, and, if special, may be in answer to questions submitted by the court; and material allegations of the plaintiff not denied by the answer, as well as material allegations of new matter in the answer not denied in the replication, are deemed admitted, but a qualified admission cannot be availed of by the other party, except as qualified. Sections 103, 240, 242, 694, 696; *Bremer v. Burgess*, 2 Wash. Ter. 290, 296; 5 Pac. Rep'r, 733, 840; *Gildersleeve v. Landon*, 73 N. Y. 609. The replication filed in this case, not being copied in the record sent up, may be assumed, as most favorable to the defendant in error, to have denied all allegations of new matter in the answer.

The leading facts of this case, then, as appearing by the special verdict, taken in connection with the admissions, express or implied, in the answer, are as follows: The defendant at one time stopped its trains at Yakima city, but never built a station there, and, after completing its road four miles further, to North Yakima, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima city. In consequence, apparently, of this, Yakima city, which at the time of filing the petition for *mandamus* was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. No other specific facts as to North Yakima are admitted by the parties or found by the jury. The defendant could build a station at Yakima city, but the cost of building one would be \$8,000, and the expense of

maintaining it \$150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses.

The special verdict includes an express finding (which appears to us to be of pure matter of fact, inferred from various circumstances, some of which are evidently not specifically found, and to be in no sense, as assumed by the court below, a conclusion of law) that there are other stations for receiving freight and passengers between North Yakima and Pasco junction, which furnish sufficient facilities for the country south of North Yakima, which must include Yakima city, as well as an equally explicit finding (which appears to have been wholly disregarded by the court below) that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima city. It also appears of record, that after the verdict and before the district court awarded the writ of *mandamus*, the county-seat was removed, pursuant to an act of the territorial legislature, from Yakima city to North Yakima.

The *mandamus* prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the territory at the relation of its prosecuting attorney (Attorney-General v. Boston, 123 Mass. 460, 479; Code Wash. Ter., § 2171), and no demand upon the defendant was necessary before applying for the writ. Com. v. Commissioners, 37 Penn. St. 237; State v. Board, 38 N. J. Law, 259; Mottu v. Primrose, 23 Md. 482; Attorney-General v. Boston, 123 Mass. 460, 477.

But upon the facts found and admitted no sufficient case is made for a writ of *mandamus*, even if the court could under any circumstances issue such a writ for the purpose set forth in the petition. The fraudulent and wrongful intent charged against the defendant in the petition is denied in the answer, and is not found by the jury. The fact that the town of North Yakima was laid out by the defendant on its own land cannot impair the right of the inhabitants of that town, whenever they settled there, or of the people of the surrounding country, to reasonable access

to the railroad. No ground is shown for requiring the defendant to maintain stations both at Yakima city and at North Yakima; there are other stations furnishing sufficient facilities for the whole country from North Yakima southward to Pasco junction; the earnings of the division of the defendant's road between those points are insufficient to pay its running expenses; and to order the station to be removed from North Yakima to Yakima city would inconvenience a much larger part of the public than it would benefit, even at the time of the return of the verdict; and before judgment in the district court, the legislature, recognizing that the public interest required it, made North Yakima the county-seat. The question whether a *mandamus* should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in *Railway Co. v. Queen*, already cited, "there is a very great difference between an indictment for not fulfilling a public duty, and a *mandamus* commanding the party liable to fulfill it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. *Marshall v. Railway Co.*, 136 U. S. 393; 10 Sup. Ct. Rep'r, 846.

For the reasons above stated, the judgment of the supreme court of the territory must be reversed, and the case remanded, with directions to enter judgment for the defendant, dismissing the petition; and Washington having been admitted into the Union as a state by act of congress passed while this writ of error was pending in this court, the mandate will be directed as the nature of the case requires, to the supreme court of the state of Washington. Act Feb. 22, 1889, chap. 180, §§ 22, 23 (25 St. 682, 683).

Judgment reversed, and mandate accordingly.

BREWER, J. I dissent from the opinion and judgment in this case. The question is not whether a railroad company can be compelled to build a depot and stop its trains at any place where are gathered two or three homes and families, nor whether courts can determine at what locality in a city or town the depot shall be placed, nor even whether, when there are two villages contiguous

the courts may determine at which of the two the company shall make its stopping-place, or compel depots at both. But the case here presented is this: A railroad company builds its road into a county, finds the county-seat already established and inhabited, the largest and most prosperous town in the county, and along the line of its road for many miles. It builds its road to and through that county-seat. There is no reason of a public nature why that should not be made a stopping-place. For some reason undisclosed—perhaps because that county-seat will not pay to the managers a bonus, or because they seek a real-estate speculation in establishing a new town—it locates its depot on the site of a “paper” town, the title to which it holds, contiguous to this established county-seat; stops only at the one, and refuses to stop at the other; and thus, for private interests, builds up a new place at the expense of the old; and for this subservience of its public duty to its private interests we are told that there is in the courts no redress; and this because congress in chartering this Northern Pacific road did not name Yakima city as a stopping place, and has not in terms delegated to the courts the power to interfere in the matter.

A railroad corporation has a public duty to perform as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the state of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts.\*

Mr. Justice Field and Mr. Justice Harlan concur with me in this dissent.

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\* Reported in 12 Sup. Ct. Rep'r, 283; 142 U. S. 492.

**Railroad companies — duty as to establishing and maintaining stations.**— Many of the leading cases on this subject are referred to in the foregoing opinion. The case of *Mobile & Ohio R. Co. v. People* (Ill.), 24 N. E. Rep'r, 642, therein cited, is reported in 2 Am. R. R. & Corp. Rep. 476. In *Conger v. New York, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 190, a specific performance of a contract, between the plaintiff and the defendant company, to locate a station at a particular place, was refused.

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SPILMAN V. CITY OF PARKERSBURG ET AL.

(Supreme Court of Appeals of West Virginia, Dec. 19, 1891.)

1. **MUNICIPAL CORPORATIONS. CREATING DEBT BEYOND CONSTITUTIONAL LIMIT. PURCHASE OF ELECTRIC LIGHT PLANT ON MONTHLY INSTALLMENTS.** A city, indebted up to the limit fixed by the constitution, cannot carry on its operations upon credit, within the meaning of credit in the constitution, in any manner or for any purpose, but must pay during the current year with funds in hand, or with funds already legally levied.

2. A city thus indebted cannot increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant; and, such indebtedness being forbidden, the contract out of which it arises, although executory, is also forbidden. The end aimed at is prohibited, which carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment.

8. **INJUNCTION BY TAX-PAYER. REMEDY.** Any tax-paying resident and voter of such city, suing on behalf of himself and of all other tax-payers of such city, has a right to enjoin the creation of any such unconstitutional indebtedness.

**A** PPEAL from circuit court, Wood county. Suit by B. D. Spilman against the city of Parkersburg and others to restrain the creation of a city debt for the erection of an electric light plant. From an order refusing defendants' motion to dissolve the injunction, defendants appeal. Affirmed.

*J. B. Jackson* and *J. A. Hutchinson* for appellants. *B. M. Ambler* for appellee.

**HOLT, J.** Article 10, section 8, of the Constitution of West Virginia, provides that "no county, city, school district or municipal corporation shall hereafter be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the

last assessment for state and county taxes previous to the incurring of such indebtedness; nor without at the same time providing for the collection of a direct annual tax, sufficient to pay annually the interest on such debt and the principal thereof within, and not exceeding, thirty-four years; provided, that no such debt shall be contracted under this section unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same." This suit involves this provision of the state constitution, and is a bill in equity, filed in the circuit court of Wood county on the 9th day of April, 1891, by B. D. Spilman, who sues on behalf of himself and all other citizens, residents and taxpayers in and of the city of Parkersburg, W. Va., against the city of Parkersburg and others, to restrain and inhibit the creation by the city of a debt for the erection of an electric light plant, alleged to be in violation of the above-mentioned section of the state constitution. The injunction was granted on May 25, 1891, until further order, and thereupon defendants gave notice of motion to be made on June 22, 1891, to dissolve, on which day the judge in vacation heard the motion, but overruled the same, refusing to dissolve the injunction, and from this order defendants below, plaintiffs in error, have obtained this appeal.

The facts are as follows: The total valuation of the taxable property on the 10th day of November, 1890, ascertained by the last assessment in the city for state and county taxes, was \$3,818,120 — five per cent of which is \$190,906. The then existing indebtedness of the city was \$190,000. On the 18th day of March, 1891, the Thomson-Houston Electric Company entered into a written contract of that date, whereby the electric company agreed to erect and install for the city a certain electric plant in accordance with specifications attached and made part of the contract, for which the city agreed to provide a suitable site, boiler and foundation for engine and dynamos, to pay all taxes on such apparatus and plant, and keep the same in repair, and also agreed to lease from the electric company such plant, furnished for street lighting, for a term of five years from the completion of the plant, and to pay at the end of each three months after its completion — that is to say, quarterly — the sum of \$1,625 for the use thereof, except that each succeeding payment was to be \$18.75 less than



the preceding payment ; and at the expiration of the term of five years the city has the right to buy the same at the price of \$1 — plainly a contract of purchase in legal effect ; in fact so designated twice in a paper made part of the contract. No question connected with this transaction was submitted to the people ; no vote was had thereon. In addition, there were in November, 1890, funds receivable from licenses, etc., the sum of \$17,444.53.

Our leading case on this subject is *List v. City of Wheeling*, 7 W. Va. 501, decided in 1874, in which the opinion of the court was delivered by Judge Haymond, a distinguished member of the constitutional convention of 1872. It was held that a court of equity in a proper case has jurisdiction to perpetually enjoin the creation of a debt prohibited by the constitution. "The evident object of the section was to prevent a growing evil of the day, viz., the creation of large debts, the unnecessary and wasteful as well as fraudulent expenditure of the substance and earnings of the people, and unnecessary and oppressive taxation." "It was not intended to and did not in any wise interfere with or prevent the levying, collecting and expenditure of taxes annually, by authority of law, by the proper legal authorities of the counties, cities, etc., \* \* \* and to do and cause to be done whatever is necessary for that purpose, including the making and causing to be made contracts touching the disbursement of the taxes levied and collected annually and the like ; and all this without a vote being taken under the eighth section of article 10 of the constitution. \* \* \* It was intended to prevent the county authorities, city authorities, etc., respectively, from creating debts against the counties, cities, etc., without the assent of three-fifths of the voters of the county, city, etc., voting upon the question as to whether the debt should be created, and then not exceeding the limit prescribed in the section." *Id.* 523. See, also, opinions of Brannon, J., in *Brannon v. County Court*, 33 W. Va. 789 ; 11 S. E. Rep'r, 34, and in *County Court v. Boreman* (W. Va.), 12 S. E. Rep'r, 490. The county, with us, and not the town in any sense, is the unit of subordinate local government, yet towns are growing in number, size, wealth and population ; and, in anticipation of this, the constitution of 1872 provides that the legislature shall provide by general laws for the incorporation of cities, towns and villages. Art. 6, § 39, Const. Such provision has been made.

Chap. 47, Code (ed. 1891), p. 421. The charter of the city of Parkersburg is contained in the act of 1887, chapter 26. The constitution was adopted by the people on the 22d day of August, 1872. "Such limitations have been found by experience to be necessary to prevent extravagance, are remedial in their nature, are based on the wise policy of paying as you go, and ought, therefore, to be construed and applied to secure the end sought." 1 Dill. Mun. Corp. (4th ed.), § 130. It was intended by the people as a precaution against injudicious action on their own part, and commended itself to their hearty approval. The state of Iowa took the lead in this matter. See Const. Iowa, 1857, art. 11, § 3. Illinois followed in her constitution of 1870. Ours was modeled after that of Illinois. Many other states now have similar constitutional provisions, and the people, in the adoption of constitutions of the new states, and amendment of constitutions of the older ones, have often had the question presented to them. Quite a number of decisions have been made in applying this provision in given cases. See reference to many of them in 15 Amer. & Eng. Enc. Law, p. 1122 et seq., and notes; 1 Dill. Mun. Corp. (4th ed.), §§ 130-138, 527, 528a. Section 8, article 10, of the West Virginia constitution is evidently intended to cut up by the roots the power of the city to become improperly indebted, for it is aimed against all such debts, no matter how they may be created, or for what purpose. Blackstone (vol. 3, p. 154) says: "The legal acceptance of debt is a sum of money due by certain and express agreement." This is given in connection with his treatment of the action of debt. In the constitution it means any debt created by contract, express or implied; any voluntary incurring of any liability to pay in any manner or for any purpose, when the given limit of indebtedness has been reached. It may be a debt payable in the future as well as one payable presently; one payable upon some contingency, such as the delivery of property, as well as for property already delivered. When the contingency happens, the debt becomes fixed; it exists. It only differs from an unqualified promise in the manner in which it is created. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else."

I do not deem it necessary to review *seriatim* the many cases

on the subject, but rather, with their help, make a careful analysis of our own constitutional provision on the point.

1. What kind of indebtedness is prohibited? "If a man have any more or less of meaning in the term he makes use of than another, he does not talk with him to the same point." By the term "indebtedness," as here used, is meant the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created, or voluntarily brought about; or for what purpose, whether it be for municipal self-preservation or not; whether for pure air, pure water, good light, clean and convenient and safe streets and sidewalks; whether it be payable now or hereafter, payable quarterly or annually, or at any date running on for thirty-four years; whether for current expenses or fixed and definite debts or charges; whether for personal property or real property, leasehold or freehold. It is none the less indebtedness, created in some manner, and for some purpose, and is within the purview and the bar of the constitution. The confusion as to "current expenses" grows out of the failure to give due weight to another part of section 8, article 10.

2. Provision for payment. The city shall "at the same time provide for the collection of a direct annual tax sufficient to pay annually the interest on such debt, and the principal thereof within and not exceeding thirty-four years." If it is an item of current expenses or any thing else for the payment of which provision has already been made by levy laid, then it needs no other provision for its payment, and is not within the letter of the constitution; neither is it within its true meaning, for a draft on a fund already in hand, or by levy already made and provided, meets it and discharges it, so that no indebtedness arises. Thus it happens that the mere coincidence of current expenses being generally met and discharged by a fund in hand or already levied for is apt to mislead us into the view that indebtedness to pay current annual expenses is not within the prohibition; whereas, as we have seen, it is as absolutely prohibited as indebtedness created in any other manner or for any other purpose. This clause of the section is for the benefit of the creditor.

3. "Shall not hereafter be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This provision is intended, by fixing a maximum limit in any and all events, to guard the people of the town from their own thoughtlessness or recklessness as to the burden put upon others, the large tax-payers being generally in the minority. It is intended to protect posterity by its limit as to time, and the tax-payers by its limit as to quantity.

4. "Not exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This gives us a precise and definite standard by which to measure and ascertain the extent to which the indebtedness may go, and we see that it does not include tithables, nor licenses, nor market fees, nor wharfage, nor police court fines, nor bridge tax, etc.

5. "Provided, that no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same," plainly intending that no such indebtedness should be created in a corner, and without the knowledge and sanction of the tax-paying voters. It should be public, and run the gauntlet of full and free discussion. The people must be in earnest about this matter, or they would not by their organic law have barred out this debt-creating power with a triple hedge of safeguards. Its wisdom is unquestioned, and it has found or is rapidly finding its way into all state constitutions. It is plainly remedial; therefore the courts should uphold it with a steady hand, and construe and apply it in the advancement of the benefit sought for, and in suppression of the evil intended to be suppressed, and not give up the citadel to the first hard case, with bad law in its train, that demands its surrender. When we apply this section, thus read and construed, to the facts of the case in hand, we find this electric contract unable to penetrate even the outer wall.

1. What matters it what we call the thing contracted for, or the contract itself—lease, purchase or executory contract to

lease or purchase — the thing thus created is a debt. It is executory; it may never be carried out. None the less it is a present binding agreement for the creation of a prospective debt.

2. The five per cent limit was already reached — it may lack a trifle, but virtually reached. The maximum measure is full. There is room for no more indebtedness. We are not permitted to piece on to the last aggregate tax value the \$17,000 or \$20,000 derived from city licenses, police fines, etc., in order to broaden the five per cent fund by enlarging the basis from which it is calculated, so as to make room for another debt. The constitution does not say so, but by what it does say excludes it. Why not take this fund, and buy the electric apparatus? Then there would be no debt. Not being capable of being used to enlarge the basis of calculation at the one end, neither can it be used to belittle the debt at the other, to make it insignificant, compared with the means of payment. To say that it is sufficient to pay with will not do. It must be applied; and when that is done the dispute is ended.

3. The people have had no say in the matter, they have not voted, nor had an opportunity to vote. The right of the city to create indebtedness is exhausted. The indebtedness amounts to \$190,000; the maximum limit is \$190,850.50 — leaving a margin of \$850.50.

4. On behalf of the city authorities it is urged with a good deal of force that this is a contract for light — one of the public necessities of city life; that to provide it is one of the urgent items of current expense; that a modern plant cannot be obtained by yearly contract; that it is so costly that no one will take the risk of supplying it in that way, but that the only obtainable terms are for a term of years, say five at the least, with quarterly or annual payments; and that as the rent or installments of purchase-money fall due only as the compensation has been earned, the funds are by that time in the treasury with which to pay. All this sounds plausible enough, but the trouble with it is no levy has been made to meet it; no provision has been made or can be made for a direct annual tax sufficient to pay it, because the indebtedness already existing is up to the maximum allowed by law; and the contract does not restrict its source of payment to current funds derivable from sources other than taxation,

such as licenses, police fines, etc., if that would avoid the trouble (as to which we express no opinion). That may be one of the sources of revenue already set apart or relied on to pay interest and principal of the \$190,000 of city indebtedness already existing. The city is rapidly increasing in taxable wealth, no doubt, but the constitution requires us to take as the basis the last assessment, and that is before us among the facts of the case, and we are not allowed to look ahead to some conjectural assessment not yet made.

I have examined all these cases of "necessary current expenses," as they are called, to which our attention has been directed; examined some of them in a perfunctory manner it is true, for no man nowadays can deliberately read every thing. *City of East St. Louis v. Gas-Light Co.*, 98 Ill. 415; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Sackett v. City of New Albany*, 88 Ind. 473; *Coy v. City Council*, 17 Iowa, 1; *Coffin v. City Council*, 26 Iowa, 515; *Grant v. City of Davenport*, 36 Iowa, 396; *Crowder v. Sullivan* (Ind. Sup.), 28 N. E. Rep'r, 94; *City of New Albany v. McCulloch* (Ind. Sup.), 26 N. E. Rep'r, 1074; *Appeal of City of Erie*, 91 Penn. St. 398; *Water-Works v. Woodward*, 49 Iowa, 58; *Smith v. Dedham*, 144 Mass. 177; 10 N. E. Rep'r, 782; *East St. Louis v. Flannigan*, 26 Ill. App. 449; *Potter v. Douglas Co.*, 87 Mo. 239; *Grant Co. v. Lake Co.*, 17 Oreg. 453; 21 Pac. Rep'r, 447; *Dively v. Cedar Falls*, 27 Iowa, 227; *Corpus Christi v. Woessner*, 58 Tex. 462; *State v. McCauley*, 15 Cal. 430; *Koppikus v. Commissioners*, 16 Cal. 249; *People v. Pacheco*, 27 Cal. 207; *Law v. People*, 87 Ill. 385; *Water Co. v. Utica*, 31 Hun, 431; *Railroad Co. v. City of Jacksonville*, 114 Ill. 567; *Laycock v. Baton Rouge*, 35 La. Ann. 475; *Association v. City of New Orleans*, 33 La. Ann. 571. I need not stop to compare and distinguish; that has been well done in 1 Dill. Mun. Corp. (4th Ed.), § 133 et seq., and notes. And I have been led to the conclusion that the safe and sound construction is laid down in the much-considered case (three times before the court) of *Prince v. City of Quincy*, 128 Ill. 443 (1889); 21 N. E. Rep'r, 768. "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the constitution to carry on their corporate operations while so indebted upon the cash system, and not upon credit to any extent or for any purpose;" that is, pay-

ment must be provided for by levy laid, as distinguished from levy hereafter intended to be laid. "If an indebtedness of a city for current expenses and supplying water is forbidden as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory, and creating only a contingent liability, is also forbidden. Prohibition of the end is prohibition of the direct, designed and appropriate means." This is the true construction. Any other would deprive these constitutional limitations of the force and efficiency indispensably required to prevent or cure the evil aimed at. To this conclusion the learned judge of the circuit court who entered the order complained of was brought, no doubt, after a careful consideration of all the authorities. I regard his conclusion as the only safe and sound one. We are working in constitutional harness in the piping times of peace, and do not feel called on to heed the exacting imperiousness of these higher laws of municipal self-preservation; but are forced to say what he has in effect said: "The city fathers, when the constitutional limit of voluntary indebtedness, as in this case, has been reached, must for the time cast about in search of the philosopher's stone, 'pay as you go.'" Therefore, the order of the circuit court of Wood county, entered by the judge in vacation on the 22d day of June, 1891, overruling defendants' motion to dissolve the injunction awarded on the 25th day of May, 1891, is affirmed.\*

**Municipal corporations — incurring debt in excess of constitutional limit.** —The authorities on this question are quite fully referred to in the foregoing opinion. We may add reference to note in 4 Am. R. R. & Corp. Rep. 820.

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## PAPPENHEIM V. METROPOLITAN EL., ETC., RY. CO.

(Court of Appeals of New York, Oct. 13, 1891.)

1. **ELEVATED RAILROAD IN STREET. RIGHTS OF PURCHASER OF ABUTTING PROPERTY AFTER ROAD IN OPERATION.** At the time plaintiff purchased certain premises the easements appurtenant thereto, of light, air and access in and over the street, were being trespassed on by defendant by the maintenance and operation of an elevated railroad in the street, it never having exercised its right to condemn the easements. Held, that plaintiff, without regard to the price paid by him for the property, had a right of action for a continuance of the trespass, and a right to compensation for the permanent injury to his property.

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\* Reported in 14 S. E. Rep'r, 279.

**A** PPEAL from superior court of New York city, general term. Action by Lena Pappenheim against the Metropolitan Elevated, etc., Railway Company. Judgment for plaintiff, and defendants appeal.

This action is brought to perpetually enjoin the defendants from operating their railway in Second avenue, between One Hundred and Twentieth and One Hundred and Twenty-first streets in the city of New York, in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from defendants the loss and damage already sustained by reason of the past operating of the defendants' railway in front of the plaintiff's premises, and, if the defendants shall be permitted to so operate their road in the future, that it shall be only upon condition that they first pay to the plaintiff the amount of the permanent loss and damage to her premises sustained by her by reason of such operation, and also the amount of her loss and damage already sustained. This is, in substance, the relief asked for by the plaintiff. The defendants, in their answer to the complaint, set up various defenses, the chief of which, and the one particularly argued and relied upon here, is that the railway was built in 1880, and has been in operation ever since, and, if any damage has been inflicted upon plaintiff's premises, by the erection and operation of the railway, such damage was inflicted at the time it was so built and operated, and at that time the premises were owned and possessed by some other person, and the plaintiff was not then their owner, and is not the owner of the cause of action. The court found that the plaintiff, on the 23d day of April, 1883, became the owner of the premises, and has ever since owned them, and since that time there has been a valuable building standing on them. Since that time the plaintiff has also owned, as attached or appurtenant to the premises, an easement of light, air and access in and over Second avenue, and the only property rights of the plaintiff interfered with by the defendants are easements of light, air and access therein appurtenant to the plaintiff's premises, and she is not seized of any estate in the land forming the bed of such avenue in front of her premises. The railroad had in fact been built and had been in operation along Second avenue for some years prior to the time when the plaintiff purchased, in 1883. She paid, according to some of the



evidence, the fair market value of the lot with the railroad in the avenue. It was also proved that the plaintiff had sustained injuries by the construction and operation of the road from the time of her purchase to the trial of the action in the sum of \$1,800, and that the value of the plaintiff's easement in fee taken, appropriated or interfered with by reason of such construction and perpetual maintenance and operation of defendant's railway, over and above any benefits resulting therefrom and peculiar to the premises, was the sum of \$2,000. It was also found that the defendants were authorized by certain acts of the legislature to exercise the right of eminent domain, and thus to acquire plaintiff's easement, if necessary, and defendants had like authority to build the railway in the streets in which it has been built; but there was nothing in the acts giving the defendants any authority to take plaintiff's property without compensation. The road has been built under the provisions of the so-called "Rapid Transit Act." Chap. 606, Laws 1875. Judgment was given for the plaintiff in accordance with the findings of the court, and it was provided that the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by plaintiff of a deed conveying to defendants plaintiff's interest in the easement taken by defendants. The judgment so entered was affirmed by the general term of the superior court of the city of New York upon appeal (13 N. Y. Supp. 955), and from the judgment of affirmance the defendants appeal here.

*Julien T. Davies* and *Brainard Tolles* for appellants. *Charles Gibson Bennett* for respondent.

PECKHAM, J. (after stating the facts as above). The structure erected by defendants in Second avenue, in front of the plaintiff's premises, was an illegal structure, and inconsistent with the use of the avenue as a public street. At the time of building the railway a trespass was committed by the defendants upon the property now owned by the plaintiff, although she did not own it at that time. Such trespass has been continued from the time when the road was built up to the time when the judgment in this action was entered. By continuing the trespass the defendants laid themselves open to continuous actions, in which the

recovery would be for the damage sustained up to the time of the commencement of each action. These propositions are clear, and are now undisputed. They have been settled by the Story and the Uline Cases, so familiar to the court and the bar. 90 N. Y. 122; 101 N. Y. 98; 4 N. E. Rep'r, 536. As the structure is illegal, and as it constitutes while it exists a continuing trespass, the railroad company is under a legal obligation to remove it, and the law presumes that the company will do so.

In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum, and that the plaintiff shall so convey. It provides that if the conveyance is made and the money paid, no injunction shall issue. If defendant refuse to pay, the injunction issues. It may be that, in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay upon the delivery of the conveyance, and, instead thereof, submitting to an injunction. Public interests might have a right to be heard in that respect. But it is enough to say that, in the cases where permanent damage is to be paid, there is a condition that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and a strict injunction would issue upon the right of the owner being determined. *Henderson v. Railroad Co.*, 78 N. Y. 423. The

owner, if he receive the amount of the permanent damage, is by the court compelled to convey the interest to the defendant which the defendant pays for in that way. Condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and defendant concedes it when it avails itself of the condition, and pays the permanent damage in order to receive the conveyance. It is only in this way that the owner recovers as for a permanent damage to his property.

In a case where the defendant has no power to condemn the property, if the owner in that event proceed in equity, he recovers only his damage up to the entry of the judgment, and at the same time secures an injunction which prevents the future trespass. If the owner sue at law, he recovers his damages as stated. If the owner, without having brought any suit in equity, sell his property at a loss caused by the erection of the railroad, the question at once arises as to what rights are acquired by the purchaser, and what claim, if any, has the vendor against defendant. The vendee has purchased and the vendor has sold to him, in fee-simple absolute, the premises fronting the street, to which premises are attached, as property passing to him by the conveyance, the easements of light, air and access which the defendant has already interfered with and trespassed upon by the erection and operation of the road. *Story v. Railroad Co.*, 90 N. Y. 122; *Lahr v. Railway Co.*, 104 N. Y. 268; 10 N. E. Rep'r, 528; *Kane v. Railroad Co.*, 125 N. Y. 164; 26 N. E. Rep'r, 278. The vendee finds the railroad making use of a portion of his property without right, and in the character of a mere wrongdoer. That use depreciates the value of the remaining part of the owner's property, and causes him daily damage. He institutes his action, either at law or in equity, to recover damages up to the time of the commencement of the action or permanently, and for an injunction, as the case may be, and, in answer to proof of ownership and daily or permanent damage, he is told by way of defense that the railroad company paid or is liable to pay to his vendor the difference between what the vendor sold the property for to him and what it could have been sold for if the railroad were not there, and, therefore, it has the right to continue the act which by such payment or liability has been changed from a trespass to a valid action. It is true that the railroad has not

received any conveyance of any right to continue the trespass. On the contrary, the vendor conveyed to plaintiff the absolute fee-simple in the property, and all the ordinary rights of ownership passed with such conveyance. It was after such conveyance, and when the vendor was no longer owner, that, according to defendants, the company paid, or became liable to pay, his alleged loss caused by such sale, and which payment or liability defendants now claim has altered the situation so effectually. The vendee, who obtained the property at what may have been a low price, has nevertheless the rights of a general owner, which are not dependent upon the price which he paid for his title. Every day that the company operates its road over or through the property of the plaintiff, it commits an illegal act or trespass; and the character of that act with respect to the property of the plaintiff is not in any degree affected by the fact that the plaintiff's vendor sold his property at a loss, which that vendor says he sustained from the illegal action of the defendant. There is no doubt that the same easements which were appurtenant to the premises owned by the plaintiff's vendor passed to his vendee, the present plaintiff, by the conveyance to her. They passed because they were appurtenant, and the vendor never attempted to reserve them, assuming even that such reservation were a legal possibility. As these easements passed to the vendee and became her property, as much so as the land itself, how is it that the railroad company has become possessed of the right to appropriate such easements, or any portion of them, without payment to her? Her private property is taken without compensation to her under such circumstances, if defendant have the right to permanently enter upon and use these easements; and thus a constitutional guaranty is violated in her case, and she is without redress. The answer to this assertion is made by the counsel for defendants in a very ingenious argument, the foundation of which is, however, laid in what seems to me an erroneous application of a general rule relating to the measure of damages in condemnation proceedings, and from which it is argued that the real actionable loss falls upon the owner of the property when the road was built, provided he sells his property in a depreciated market. They claim that such an owner has a cause of action to recover the loss he has sustained by a sale of his property in a market

depreciated by the wrongful act of defendants in entering upon or appropriating the easements appurtenant to such property. The argument, of course, assumes that, if such a cause of action be made out, it must follow that none arises in favor of a subsequent purchaser who obtains the land at a price reduced on account of the existence of the road. Unless the one cause of action exclude the other, the defendants would accomplish nothing by proving the existence of one in favor of the original owner.

The defendants' counsel assert that the permanent damage to the property was sustained by the vendor at the time he sold to the plaintiff, and that the company is liable to pay the same to him. Hence they say that in taking from the present owner the easements spoken of—which, when separated from the land to which they are appurtenant, are of themselves but of a nominal value—the defendants would only be condemned to pay therefor a nominal sum, such as six cents; and as to the resulting loss in value to the adjoining land of the vendee, caused by the erection and operation of the railroad, the vendee has not sustained that loss, because she has only paid for the property the sum to which it had depreciated by reason of the existence of the road in front of it. Continuing the argument, the counsel for the defendants state that if the present owner (the vendee) should commence an action to restrain the further trespass the defendants could at once commence proceedings to condemn the easements, and that the rule of damages would be the difference between the present market value of the whole property and that portion which would be left after the taking, and that difference would be nominal only; so that when the present owner commences her action to restrain the further commission of the trespass the whole matter may be adjusted in such suit, and the same rule of damages would obtain. The result would be either that the defendants would be enjoined from further operating their road until they paid six cents, the nominal damage sustained by the present owner, or else the bill would be dismissed entirely, on the ground that the aid of equity could not be invoked for the purpose of compelling the payment of merely nominal damages. This course of argument does not, as it seems to me, answer the claim of the present owner to enjoin the further trespass upon her property unless she is paid the dam-

age which such trespass will permanently cause her. That damage is not merely nominal.

In 1880, the defendants erected their road, and by its erection and operation depreciated the value of the property now owned by the plaintiff. In erecting their road, they trespassed upon the easements appurtenant to that property, and such trespass has been continuous ever since. By these wrongful acts the market value of the plaintiff's property has been greatly depreciated. If they were compelled to resort to condemnation proceedings, the defendants say it is the present market value which they must pay. The vice in this argument lies in the erroneous statement of the measure of damages. In such case, and under these circumstances, where the value has been depreciated by the wrongful entry of defendants upon the property, it is not the present market value of such property thus damaged that the defendants must pay. Actual market value at the time of the institution of the condemnation proceedings is usually the inquiry. But when the defendant has already entered upon the property, and has depreciated its value thereby, it is plain that the simple question of value at the time of condemnation is not the proper rule. In such case the inquiry must be, what would be the fair market value of the whole property at the time of condemnation, without the railroad; and the difference between that sum and the present market value of the property left, with the railroad in existence, would constitute the measure of damages to which the owner would be entitled. This inaugurates no new rule of damages in condemnation proceedings in this state. As the entry was unlawful, it is, for the purpose of arriving at the value of the property, regarded as not made, and the inquiry is, what is the present value of such property without the presence of a structure which is there without right, and which cannot be continued without payment in full for all damage done? Its existence cannot be considered for the purpose of diminishing what would otherwise be the present market value of the property. I think the same rule would hold in the case put by the defendants, where the city or any other body having the power should seek to take the owner's property, even though such owner had himself purchased subsequent to the erection of the road. The city would have no right to take the property from its owner on a valuation based upon the

permanent character of a trespass which the law regards as temporary.

The inquiry in the case supposed would still be, what would be the fair market value of the property with the railroad away? That sum the city would have to pay; and when it acquired the title it would have the same right as any other owner to compel the defendants to desist from their trespass, or pay the amount of permanent damage they caused by its continuance. Under this rule the amount which the present owner may have paid for the property will be wholly immaterial. As the act of the defendants in trespassing upon or appropriating any portion of the property was unlawful, any depreciation in the value of the property caused by such illegal action cannot be regarded in fixing the value of the property to be taken, or the damage to that which will remain. The claim of the defendants that this depreciation in value was suffered by the original owner when he sold, and that it is a personal claim in his case against them for which they are responsible, cannot, as it seems to me, be maintained. Such a doctrine would do away with the right of an owner of property to prevent a continuous trespass upon it by another. The defendants would say that, because the original owner transferred the property to his vendee, the defendants by reason thereof were thereby invested with the right to continue forever the original trespass, and the consideration for such license rested in their liability to pay (not necessarily in the payment to) the vendor the difference between the sum which he actually received for the conveyance of his land and that which he would have been able to secure, had it not been for the acts of the defendants. Whether such sum had been paid, or not would be immaterial so far as concerned the present owner. That would be a matter between the original owner and the defendants. But the present owner, on account of the transfer of the land to him, would really have no right to prevent the trespass, no matter how much in truth his property was damaged, and although the defendants had no more title to the property trespassed upon than they ever had. They could have no title, because the original owner transferred it to his vendee, and after such transfer, of course, that owner could not again transfer any portion of the property to any one else. The vendee took the title, and he certainly has not conveyed it to the defendants, but

on the contrary, still retains it absolutely. Thus with no title, the defendants have, by this course of reasoning, been in substance invested with a right to perpetually appropriate property belonging to the plaintiff, because of a liability on their part, as they allege, to pay a former owner certain damages which he alleges he sustained by selling his property to the plaintiff at a reduced value caused by defendants' illegal act. This mere liability of the defendants to reimburse the vendor operates, by defendants' argument, as a bar to the rights of the vendee. If not paid by the defendants, the liability still remains, and of course the bar still continues; and thus the general right which follows the possession of property to protect it from a trespass is denied an owner because the defendants are, they say, liable to a former owner on a personal claim by him for a loss occasioned by a sale. Heretofore absolute ownership or legal possession of property has been regarded as sufficient to enable the owner to protect it from a trespass. It has been sufficient to permit him to maintain an action to restrain its continuance, even though he was fortunate enough to secure the property at one-half its value. The inquiry in such cases, where the owner sought to restrain the future trespass, has never been in regard to the price which the owner paid, or whether the former owner sold at a loss on account of the trespass.

The inquiry has been whether the plaintiff was the owner or entitled to the possession, and whether the acts of the defendant were illegal. That is all that should now be required.

I have thus far referred to the case of the vendee for the purpose of inquiring what rights appertained to him as the present owner of the property. But the argument in favor of the vendor, who owned the property when the road was built, and who sold his land in a depreciated market caused by the wrongful acts of the defendants, is not to my mind very strong. In the first place, he had his right of action to recover for all damage caused by the trespass up to the time of the commencement of his action, and the subsequent conveyance of the land would not in any way affect that right. If he desired to restrain its further continuance, or to recover for the permanent damage caused, he could while owner commence and maintain his action in equity. In that action he would obtain full relief. If he chose to sell instead of using the remedies which the law gives him, that was a matter,



legally speaking, of his own choice. The defendants did not compel or limit or restrain such sale. Nothing that they did could be said to amount to any compulsion by them. The law says their action cannot be regarded as a permanent trespass, for the very reason that it is unlawful, and the law will not presume that an unlawful act is to be forever continued. His choice to sell rather than avail himself of the remedies given him by the law, does not furnish a cause of action against the defendants to reimburse him for a loss, arising because of the presumption he has indulged in that the trespass would be continuous and unpaid for. He has chosen to regard the trespass in a light opposite to that in which the law regards it, and the loss he has suffered thereby is not one which the law can regard as caused by the defendants. If the original owner thus chooses to sell his property without enforcing those rights which he has only by virtue of such ownership, the purchaser at any rate takes his fee, and with it the rights of such an owner. The right to enjoin the continuance of the trespass has not escaped by the conveyance. It cannot rest with the vendor, for he has no longer any interest in the land. Unless it passed to the vendee it has vanished; and yet no conveyance by any one having the right to convey has been made to the trespasser, and so far as the legal title to the property is concerned the trespasser has no lot or parcel in it. It seems to me the right passed to the vendee. I can see no similarity in the case of the owner of property who has thus sold at a loss, to that of one who has suffered from a slander of his title. To start with, there is in the case at bar no slander. And again there is no malice. The erection of a structure on plaintiff's property by defendants cannot be twisted into a slander of plaintiff's title by them. No one asserts that the defendants built their road knowing they were wrong-doers or trespassers.

The findings in this case substantially negative any such idea. The court finds that the road was built in conformity with plans prescribed by boards of commissioners appointed under legislative authority. It has been held that punitive damages ought not to be awarded against defendants for the taking of the property of abutting owners by the building of their road. *Powers v. Railroad Co.*, 120 N. Y. 178; 24 N. E. Rep'r, 295. In brief, all the substantial facts which constitute a cause of action for slander

of title are absent in this case, and the facts which exist here have no analogy to those which constitute such a cause of action. The wrong by the defendants in the erection of the railroad does not directly or proximately cause the sale of the vendor's property at a loss. The defendant's counsel lays down the rule broadly that "whoever, by a wrongful act, limits or restrains another in respect to his lawful right to dispose of his property in the market to the best advantage, is liable in an action at law for the damages thereby occasioned." Without stopping to question the accuracy of the rule which the defendants here lay down as an abstract proposition, I think no case can be found where it has been enforced under such circumstances as this case presents. All the facts must be here taken into account. It must be remembered that the law regards the act as a temporary wrong only, and as such it provides a full remedy for it. It provides a full equitable remedy if the owner choose to pursue it, and the act be of a permanent nature. If, instead of resorting to his legal or equitable remedy, he chooses to sell, it cannot be said that in a legal sense he has been limited or restrained in respect to his lawful right to sell his property by defendants' wrongful act. The connection between the sale and the alleged cause is too remote and indefinite. It is not proximate or direct. Further than this, however, the right of action with respect to the damage inheres in the owner and possessor of the land, and it is by reason of such ownership and possession that the right of action accrues. *Broiestedt's Case*, 55 N. Y. 220; *Corning v. Nail Factory*, 40 N. Y. 191. A perpetual injunction was sustained in the first above-entitled case, which was obtained by a purchaser of land abutting on the street, restraining the further operation of the road, although it was operated prior to his purchase. Nothing that has been said in any other case in this court is opposed to these views. On the contrary, they are in the line of all its previous utterances. The point was not decided in the *Henderson Case*, nor has it been decided in the *Lawrence Case*, against these same defendants. Reported in 126 N. Y. 483; 27 N. E. Rep'r, 765. The question in the last case was in relation to the validity of the defense alleging that the property was used for the purposes of a house of prostitution. The defense was disallowed for the reasons stated in the opinion of *Andrews, J.*, and the rule of damages stated

in the Uline Case was reiterated—that of diminished rental value.

The case of *King v. Mayor, etc.*, 102 N. Y. 174; 6 N. E. Rep'r, 395, simply held that the right to compensation for the property taken belonged to him who was the owner of the fee at the time the city took possession, although before the award under the statute the original owner had conveyed the premises. This was upon the ground that the statute authorizing the taking contained an adequate and certain method for raising the money on the part of the city to pay for the taking and that when the possession was taken by the city under the statute it was a legal possession, and the award which was subsequently made paid for the title at the time the possession was taken, and that was in the original owner, who conveyed before the award was made. The *Tallman Case*, 121 N. Y. 119; 23 N. E. Rep'r, 1134, does not assert or assume that the plaintiff could recover for the diminished rental value for a term any portion of which was in the future. The recovery in that case had been allowed for a possible use of the premises which the plaintiff had not, in fact, attempted to make, and the possible profits for such possible use we held he was not entitled to. I have, as is seen, alluded to but a few of the many cases cited by counsel in the very elaborate briefs submitted to us. I have, however, read them, and I feel confident that nothing is laid down herein which is opposed to any thing heretofore decided by this court.

What the ultimate rights of lessor and lessees, against defendants, may be, we, of course, do not decide in this case. Their rights are not before us. Whether there is or is not any distinction between the rights of a vendor in fee and those of a lessor, is not the question, and we do not, therefore, argue it. The judgment here should be affirmed, with costs. All concur.\*

1. *Elevated railroad in street—conveyance of abutting property after road built—rights of vendee.*—In the note to *Fordyce v. Wolfe*, ante, p. 205, we considered the right to compensation for land taken for public use, as between grantor and grantee, in cases where the land was occupied without right and was conveyed pending the wrongful occupation. The question which lies at the foundation of the principal case is whether the wrong from which the damages in question arose, was single and indivisible or whether it was divisible and continuing. We have elsewhere laid down a test for determin-

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\* Reported in 23 N. E. Rep'r, 518; 123 N. Y. 436.

ing this question, which is this: "If the wrong is capable of being abated then a distinction is to be taken between the damages resulting from the original wrong and damages resulting from the failure to abate it." 1 Am. R. R. & Corp. Rep. 723. The reasons for this conclusion are given in the note referred to. In the principal case it is manifest that the wrong was capable of being abated. It was possible to remove the elevated road and restore the street to its original condition. Therefore, a distinction existed between the damages occasioned to the property in question by the original construction of the road and the damages arising from the continuance of the structure. The only rights which the abutting owner has at any given point of time are, first, to recover compensation for the damages inflicted in the past, and, second, to prevent a continuance of the wrong in the future. In other words he has a right to an action at law for the past damage and to an action in equity to prevent future damage. The claim for past damages is an accrued and vested right of a personal nature, in no way attached to the land and consequently remains unaffected by a conveyance of the land. On the other hand the right to prevent future damage, is a right inseparable from the land and consequently passes with it to the grantee in case of a conveyance. This right being in the grantee he is manifestly the one with whom the company must deal in acquiring the right to permanently maintain their structure, and who is entitled to the compensation or price of such. Permanent damages are in effect the price at which the owner sells or is compelled to sell the right to permanently maintain and operate the road, and thus permanently to interfere with, abridge or impair the easement appurtenant to his property. See, further, *Galway v. Metropolitan El. Ry. Co.*, post, and note. The doctrine of the principal case was affirmed in *Sterry v. New York El. R. Co.*, 120 N. Y. 619; 29 N. E. Rep'r, 68; see, also, *Mortimer v. Manhattan R. Co.*, 120 N. Y. 81; 29 N. E. Rep'r, 5.

2. *Rights of executors and trustees of deceased owner.*—The executors and trustees of a deceased abutting owner do not occupy the relation of purchasers, but succeed, in behalf of the beneficiaries, to the rights of the abutter, and may recover for damages to the rental value of the land, caused by the operation of such railroad. *Mortimer v. Manhattan R. Co.*, 120 N. Y. 81; 29 N. E. Rep'r, 5.

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## GALWAY V. METROPOLITAN EL. RY. CO. ET AL.

(Court of Appeals of New York, Oct. 6, 1891.)

1. *ELEVATED RAILROAD IN STREET. REMEDY IN EQUITY, WHEN BARRED BY STATUTE OF LIMITATIONS.* Code of Civil Procedure of New York, section 388, providing that an action, the limitation of which is not therein specially prescribed, must be commenced within ten years after the cause of action accrues, does not apply to an equity action to restrain continuous trespasses on land resulting from an elevated railway in the street upon which it abuts, and such an action, therefore, is not barred in ten years from the original trespass, but may be maintained so long as the plaintiff has title to the

property injured, and a cause of action for such injuries is not barred at law.

2. LACHES. EFFECT OF ELEVEN YEARS' DELAY. Plaintiff sued to restrain the further operation of an elevated street railway which had been built eleven years before without the consent of abutting owners. Plaintiff had seen the railway in course of construction at that time, and had subscribed money for the employment of counsel to prevent it, but had made no other protest, nor instituted any legal proceedings. His opposition, however, had been persistent, as had that also of the other owners, and their claim had always been that defendants had no right to build in the street without compensating them for damages. Held, that the plaintiff's conduct was not such as to estop him; and that the mere fact of his delay in bringing suit was no defense, so long as his rights to the property were not barred by adverse possession.

**A** PPEAL from supreme court, general term, first department. Action by James Galway against the Metropolitan Elevated Railway Company and the Manhattan Railway Company to restrain the operation of defendants' elevated railroad in front of the plaintiff's property, and to recover damages for injury by the railroad to said property. There was a judgment for plaintiff, and defendants appealed. Affirmed.

*John F. Dillon and Julien T. Davies* for appellants. *George Zabriskie* for respondent.

RUGER, C. J. This is one of the usual actions in equity to restrain the defendants from further maintaining and operating an elevated street railroad on Sixth avenue, in the city of New York, adjacent to the plaintiff's property, thereby unlawfully interfering with it. This property consisted of five vacant lots, extending about one hundred and twenty-five feet along the easterly side of the avenue, between Fifty-seventh and Fifty-eighth streets, and was acquired by the plaintiff by purchase in and previous to 1871. The defendant, the Metropolitan Elevated Railway Company, commenced and completed the structure of its railroad between the months of January and July, 1878, and from the time of its completion to the commencement of this action, in 1889, it has, either by itself or through its lessee, the Manhattan Railway Company, continued to maintain and operate an elevated steam railroad in front of and adjoining the plaintiff's premises on Sixth avenue. No proceedings were taken by the railroad to acquire the easements of the abutting owners in the avenue, or their con-

sent to its construction. The plaintiff complained that by reason of the operation of such railroad, in impairing the easements of light, air and access to his premises, he had been damaged, and demanded judgment for such damages as well as a perpetual injunction against the defendants from further operating and maintaining their railroad in front of his premises. A trial was had at special term, and the court declined to award pecuniary damages to the plaintiff, but rendered judgment granting the relief by injunction unless the defendant should pay to the plaintiff, within a limited time, the sum of \$20,000 as the depreciation of the value of the premises caused by the railroad, and upon such payment being made required the plaintiff to execute to the defendants a conveyance of the easements. The depreciation in the value of plaintiff's property by reason of the erection and maintenance of the railroad was found by the trial court to be \$20,000, and the evidence supported that finding. It was also found that the plaintiff saw the railroad in the course of construction in front of his premises, and, from time to time, saw what defendants were doing in respect thereto and occasionally as a passenger rode upon it. He subscribed money to pay for counsel to prevent the erection of the road, but made no protest otherwise and instituted no legal proceedings to enjoin its construction or operation prior to the commencement of this action. It was also found that, after the commencement of the action, but before the trial, the defendants instituted proceedings for the condemnation of that part of the easements referred to which had been taken for the use of such railroads, and that such proceedings were pending, undetermined, at the time of the trial. The defendants requested the trial court to find the following propositions of law: *First*, "that this action is barred by the statute of limitations;" and, *second*, "that plaintiff's alleged right of action is barred by his acquiescence in said railroad and its operation, and his use thereof as a passenger," and that he is estopped from maintaining the action. The court refused to find as requested, and it is conceded by the defendants that the exceptions to such refusal raise the only questions to be considered on this appeal.

It is claimed that the ten-year statute of limitations commenced to run against an equity action from the time the plaintiff was first entitled to commence such action, and, that period having

elapsed, that the plaintiff was barred from maintaining such action by section 388 of the Code of Civil Procedure. This section is the general statute adopted in the Code as a precautionary measure to cover cases inadvertently omitted or otherwise unprovided for. The general right of an abutting owner on a public street to recover damages for an unlawful invasion of his easements by the erection and maintenance of an elevated railroad in the street adjoining his premises is not contested by the defendants; nor is the liability of the defendants to make compensation to the plaintiff for the injury inflicted upon his property by the construction and operation of their railroad disputed, or his right to maintain successive actions at law to recover damages for the injury to his easements; but it is claimed that he has lost the right to proceed in equity, not only by reason of the statute of limitations, but also by virtue of an equitable estoppel arising out of the alleged acquiescence in the admitted trespasses. The case, therefore, involves the question how far, if at all, the owner has forfeited his rights in his property by reason of his alleged laches and inaction during the period of eleven years intervening between the construction of the road and the commencement of the action.

We think it would be impossible to sustain this appeal without unsettling the established law of the state. It is, in effect, an effort to exempt actions in equity from the operation of the well-settled principle, that trespasses upon real property, effected by an unlawful structure or nuisance, are continuous in their nature, and give successive causes of action from time to time, as the injuries are perpetrated. The questions raised are answered by elementary principles established in this state by numerous reported cases. They are found in the two propositions that continuous injuries to real estate caused by the maintenance of a nuisance or other unlawful structure create separate causes of action, barred only by the running of the statute against the successive trespasses; and the further principle that no lapse of time or inaction merely, on the part of the plaintiff during the erection and maintenance of such structure, unless it has continued for the length of time necessary to effect a change of title in the property claimed to have been injured, is sufficient to defeat the right of the owner to damages. It may be that there is no case where the precise question as to the application of section 388 to such causes

of action has been directly decided in this state; but the rule follows as a logical conclusion from the cases, and it affords a strong argument against the appellants' theory that, in the numerous cases in this state in which the question has been involved the point has never before been taken by counsel for the trespasser in any case in this court. It is not claimed here that the plaintiff has ceased to be the owner of the easements impaired, or that any other party has acquired title thereto, but it is argued that he has lost the right to employ the equitable power of the courts, by reason of his neglect to demand it within ten years from the time when a cause of action accrued. Thus, although the wrongful acts may be continued and the owner subjected to irreparable injury, and his legal remedy may be either inadequate, or require that it should be sought through repeated and numerous actions at law, it is contended that the jurisdiction of an equity court shall be arrested at the very time when, in the interest of the public, the exercise of its power becomes the most apparent and necessary. This claim we think is altogether untenable.

The right of abutting owners to damages for an invasion of their rights in the public streets is predicated upon the constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, or have his property taken for public use without just compensation; and it necessarily follows that, so long as such person continues to be the owner of property and liable to be injured in respect thereto by the unlawful acts of others, he is entitled to invoke the protection of the fundamental law, without regard to the lapse of time that may occur before the commencement of legal proceedings, provided the remedy is claimed within the statutory period of limitation applicable to his legal right, or before adverse possession has barred his title to the property injured. *Uline v. Railroad Co.*, 101 N. Y. 98; 4 N. E. Rep'r, 536; *Arnold v. Railroad Co.*, 55 N. Y. 661; *Colrick v. Swinburne*, 105 N. Y. 503; 12 N. E. Rep'r, 427; *Tallman v. Railroad Co.*, 121 N. Y. 123; 23 N. E. Rep'r, 1134. The cause of action, both at law and equity, in such cases, arises out of the trespasses committed, and is based on the ownership of the property upon which the injuries are inflicted, and it is obvious that no cause of action can be barred while there is an outstanding legal cause of action for which the party has a legal remedy. The ex-



istence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but is also the foundation of the jurisdiction which equity courts possess in respect to the subject-matter. The questions presented have been so frequently considered and decided in this court, in analogous cases, adversely to the contention of the appellants, that they should no longer be the subject of controversy or debate. The learning and ability, however, with which the counsel for the appellants have pressed their case before us, have induced us to treat the questions argued at greater length than would otherwise have been thought necessary or proper, and we, therefore, indicate briefly, the general theory upon which this court has proceeded in the determination of like questions. That theory is concisely expressed by Judge Earl in the Case of Tallman, *supra*. It was there said that, "when the defendant began to construct its railway in front of the plaintiff's lots, he could have commenced an action in equity against it, and restrained it until it had made compensation to him for the rights and easements which it took from him, or until it had acquired them by condemnation proceedings. In that way he would at least in the theory of the law, have been indemnified for all the damage he would suffer by reason of the construction of the railway. Instead of taking his remedy by an equitable action at that time, he could have taken it at any time afterward, during his ownership of the lots, with the same result. He was not, however, confined to his remedy by such an action. He could suffer the railway to be constructed, and then bring successive actions to recover damages to his lots caused by the construction, maintenance and operation of the railway." In the Arnold Case it was held that an easement to carry water in a trunk over the land of another "was such an interest in land as could not be modified or discharged save by conveyance in writing or by operation of law; that it was property within the meaning of article 1, section 6, of the constitution, and, therefore, could not, nor could any portion of it, be taken for public use without compensation;" and "that this right of enjoying such easement was a continuous one, and the unlawful preventing its exercise a continuous injury; and that, therefore, the statute of limitations did not bar plaintiff's claim for the injuries sustained." It is now the settled law of this state that no action at law can be maintained by an owner to recover

prospective damages for injuries inflicted upon real property, and it is equally certain, we think, that an equity action for that purpose alone cannot be sustained. *Uline v. Railroad Co.*, *supra*; *Pond v. Railroad Co.*, 112 N. Y. 187; 19 N. E. Rep'r, 487. Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim. Where the trespass is of such a character that it may be discontinued, at the option of the wrong-doer, or if continued, is susceptible of having legal sanction obtained for its continuance, it seems offensive to our sense of right that a wrong-doer should be permitted to allege that his intention to repeat and continue his own unlawful conduct should deprive the owner of any of the remedies which the law has provided for his protection. If it were otherwise, the wrong-doer would be permitted to show the aggravated character of his own conduct as a defense to the action of the legal owner, and thus violate the rule of law as well as the plainest principles of equity. Upon settled principles, a court of equity had unquestioned jurisdiction, by reason of the continuance of the legal right and the inadequacy of the legal remedy, to render the judgment pronounced in this case by the trial court. *Henderson's Case*, 78 N. Y. 423; *Tallman's Case*, *supra*.

That successive causes of action have accrued to the owner for each day's maintenance and operation of the railroad structure adjoining his premises is indisputable, and that he is entitled to recover some damages for each trespass, even though it be nominal only, is equally undeniable. *Colrick v. Swinburne*, *supra*. The plaintiff may delay his action, and join together such causes of action as have not been outlawed, or he may bring an action daily, and recover such damages as he can establish. *Baldwin v. Calkins*, 10 Wend. 167. In the case of unoccupied lands, these damages may be small, but by delay the owner may lose them altogether, and in the meanwhile his toleration may be laying the foundation of an adverse claim to the property itself, and thus be the cause to him of irreparable injury. While it is indispensable to the protection of his rights that he should assert them before his right is barred, in such case it may not be to his interest to do

so as often or as promptly as when his damages are large and immediate; but no bar is available against his laches unless it continues until the legal action is barred. The jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the owner's grievance, and must, from the nature of the case, continue so long as that necessity exists. The existence of either of the grounds of equity jurisdiction referred to is sufficient to maintain an action, but they in fact are all present here, and indicate the propriety of the judgment appealed from. It was said by Judge Earl in *Campbell v. Seaman*, 63 N. Y. 582, that "the right to an injunction, in a proper case, in England and most of the states, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by a proper tribunal." The lapse, therefore, of six years after a trespass has been committed upon real estate bars not only the legal action, but also constitutes a practical defense to an equitable action founded upon the necessity of numerous legal actions to obtain redress; because the right to such redress has, as to such wrongs, expired. But if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable not only at law, but also in equity. *Uline's Case*, *supra*.

Section 388 of the Code finds its true interpretation when applied to causes of action founded upon equitable rights alone, or cases not specified in the general statutes of limitation. It being conceded, as to legal causes of action for trespass and nuisance, that the injuries thereby occasioned are continuous, and arise from time to time as fresh trespasses are committed, it is difficult to see why the same principle should not apply with at least equal force and propriety to equitable actions. Indeed it is obvious that it should be held to apply with greater reason to the latter, since otherwise the equity jurisdiction would be practically subverted. While the appellants' contention would permit the equity jurisdiction to be preserved for ten years, it precludes its exercise forever thereafter, and leaves the evils of incessant litigation to harass the public for practically an unlimited period of time. It would seem, therefore, that it is immaterial, either in

equity or at law, whether the injuries done to the owner's property were originally intended by the wrong-doer to be perpetual and of a permanent character, or were of a temporary nature only, and occasional in their operation. The law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued. *Krehl v. Burrell*, 11 Ch. Div. 146; *Henderson's Case supra*; *Baldwin v. Calkins*, 10 Wend. 170; *Williams v. Railroad Co.*, 16 N. Y. 111.

The defendants' chief contention is that the relief in equity, as now given against elevated railroads for invasions of the rights of abutting owners in streets, is, practically, an action to recover permanent damages for such injuries, and that, therefore, the statute of limitations should commence to run from the time when any cause of action arose. There would be some force in this argument were that the real character of the action or if the equity courts had assumed to exercise the power of awarding damages on that theory, but we know of no instance in which they have done so in this state. The action here is, neither in practice or theory, an action of such a character, and by its fundamental rules, as well as the constitutional requirement that compensation for such property shall be assessed by a jury or commission alone, an equity court is incapacitated from entertaining actions instituted for the purpose of recovering damages alone. *Bradley v. Bosley*, 1 Barb. Ch. 125; *Morss v. Elnendorf*, 11 Paige, 277; art. 1, § 7, Const. A court of law is the exclusive tribunal for the determination of such actions. We have been referred to no case in this state where an equity court has assumed the authority to render judgment for prospective damages against a wrong-doer, and we think, in the nature of the jurisdiction of such courts, a suit brought for such a purpose alone is not authorized. To say, therefore, that an action, in which the plaintiff has no legal right to demand permanent damages and the court owes no legal duty to award them, affords the owner an adequate remedy for such damages, is to pervert the plain character of the action. While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time, or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the

owner's damages, they have never, to our knowledge, rendered judgment for such damages, or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party and not as a matter of right to the injured owner. As was said in the Henderson Case, "equitable relief is awarded, not, as the defendant's counsel claims, by way of menace or as a means of compelling the payment of money, but that the defendant may desist from an unauthorized use of the plaintiffs' property, and forbear from any further interference with their rights." Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted. The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him or to suffer the judgment of the court to stand. While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it nevertheless does no more than to place in his hands the means of escaping from the disastrous consequences of a judgment which has been rendered inoperative by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition, and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their protection. It furnishes no cause of complaint to the wrong-doer that the court, having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not

A consideration of the cases generally, in which equity courts have exercised the power of giving damages as an incident of the equitable relief granted, seems to be unnecessary in this case, as such courts in this state have not in this class of actions, so far as we know, assumed to exercise that power. The cases cited by the appellants to sustain the authority of an equity court to award permanent damages to real property were those of foreign jurisdiction where special statutes existed, or those in which no constitutional provisions requiring such damages to be assessed by a jury or commissioners were in force. Here such a requirement exists, and the courts decline to assess such damages, but simply say to the corporations, "You may escape the legal consequences of your conduct by complying with certain conditions, as, for instance, by paying the plaintiff a specified sum of money." This sum may represent the actual depreciation in the value of the plaintiff's property, or the amount of damages already suffered, or any other arbitrary sum. The defendant, who has an option to pay it or not, at his own will, cannot justly complain of the action of the court. The option is given to the defendant, and not to the plaintiff. His remedy is confined to his injunction. The injury which results to the defendant, in case the option is not accepted, results from the judgment rendered by the court, and not from his neglect to make payment. The expression, made use of in some of the cases, to the effect that "the only remedy, whereby just compensation for the property taken can be compelled, is an action to restrain the continuous trespasses" (Pond v. Railroad Co., 112 N. Y. 186; 19 N. E. Rep'r, 487; Tallman Case, *supra*), means simply that an injured party can by that means secure the enjoyment of his property, unless the wrongdoer, by making compensation, in some form, for the injury inflicted, has acquired the lawful right to continue it. In this sense only, they may be, not incorrectly, called actions to compel the payment of damages.

The defendants also urge as a reason why the statute of limitations should bar this action, that otherwise they will be embarrassed in their efforts to secure a right by prescription. We ascribe but little weight to this suggestion. The law applies a period of limitation to actions for the public benefit. They are termed "statutes of reform," are founded upon the maxim, *interest*

*republicæ ut sit finis litium.* They are not intended for the benefit of wrong-doers, and while the law tolerates and protects title acquired by prescription, when clearly made out, it does not favor or encourage that mode of acquiring property.

We are, therefore, of the opinion that the right to bring an equity action to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass, but may be sustained, if brought at any time, so long as the plaintiff has title to the property injured; and a cause of action for such injuries is not barred at law.

But the defendants, failing to establish the bar of the statute of limitations, still insist that the affiliated principle of acquiescence constitutes a defense to the action. There is no foundation in the case for a claim that the plaintiff's conduct amounted to an estoppel, and indeed the claim is not seriously urged by the appellants. It is obvious that such conduct has never led the defendant into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the plaintiff. They inaugurated their enterprise in the face of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them. From the inception of the enterprise to the present time, the claim has been made that the defendants had no right to build their road in the streets of New York without compensating the abutting owners for the damages inflicted upon their property, and the defendants have continued the prosecution of their purpose regardless of their legal liability, and in the face of strenuous opposition, with an apparent intention to wholly ignore the claims of such owners. The judicial annals of the state are filled with the history of the litigations which have sprung out of the efforts of the elevated railroad companies to appropriate the property of the citizens of New York to the benefit of such railroads without compensation. In view of these facts it is idle to claim that such companies have been induced, in any respect, to prosecute their enterprises in reliance upon the assumed acquiescence of the owners. *Boardman v. Railway Co.*, 84 N. Y. 181. The building and completion of their road in this case occurred in the

first half of 1878, and before the numerous parties concerned could have been fully awake to the real consequences of the enterprise. So far as the permanent structure is concerned, their expenditures were all incurred within six months, and while the parties were making earnest efforts to stay any expenditures.

The case is entirely destitute of proofs showing the existence of any elements of estoppel, and the defendants are, therefore, driven to rely, in this respect, upon the mere inaction of the plaintiff to prosecute his claim. This claim comes with little grace from parties who have for a much longer period neglected to take proceedings to acquire the real ownership of the property required by them in the prosecution of their enterprise. But this question we also think is governed by authority equally conclusive with that relating to the statute of limitations. The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. Whatever may be the rule in other states it can be said that here no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the presumption of a grant. The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violation of this right has been uniformly applied in this court. *Tallman v. Railroad Co.*, supra; *Arnold v. Railroad Co.*, supra; *Broiestedt v. Railroad Co.*, 55 N. Y. 220; *Campbell v. Seaman*, supra; *Ormsby v. Mining Co.*, 56 N. Y. 623; *Haight v. Price*, 21 N. Y. 240; *Viele v. Jndson*, 82 N. Y. 32; *Rubber Co. v. Rothery*, 107 N. Y. 310; 14 N. E. Rep'r, 269; *Chapman v. City of Rochester*, 110 N. Y. 273; 18 N. E. Rep'r, 88.

In the case of *Ormsby*, as appears by the head-note, it was held that "the doctrine of laches and acquiescence, as a bar to an action through lapse of time, finds its just application in respect to equitable rights only. As to legal rights, mere lapse of time, before an action to enforce them, is of no moment, unless it comes up to the requirements of the statute of limitations." In the *Chapman Case* this court held that the silence and inaction of the plaintiff while seeing the defendant construct sewers and



spend large sums of money in completing a sewage system, which discharged the filth of the city into a stream belonging to the plaintiff, did not constitute a defense to an action for an injunction, no matter how long continued, unless accompanied by circumstances amounting to an estoppel. It was held in *Haight v. Price* "that no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of a grant or of license." Judge Earl, in the *Campbell Case*, said: "It is claimed that the plaintiffs so far acquiesced in this nuisance as to bar them from equitable relief. I do not perceive how any acquiescence short of twenty years can bar one from complaining of a nuisance, unless his conduct has been such as to estop him. \* \* \* No act or omission of theirs induced the defendant to incur large expenses, or to take any action which could be the basis of an estoppel against them, and, therefore, there was no acquiescence or laches which should bar the plaintiffs, within any rule laid down in any reported case." In *Viele v. Judson*, Judge Finch, in speaking of the cases where acquiescence had been held a bar, says: "In all of these the silence operated as a fraud, and actually itself misled. In all there was both the specific opportunity and apparent duty to speak, and in all the party maintaining silence knew that some one was relying upon that silence, and either acting or about to act as he would not have done had the truth been told." It was held in the *Broiestedt Case* that the possession by a railroad company of a highway, under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil, and cannot be said to be adverse to him. In *Rubber Co. v. Rothery*, the defendant had built expensive structures for manufacturing purposes, and diverted the water from a stream adjoining plaintiff's premises for the purpose of supplying power to his machinery. It was claimed that the plaintiff, by his silence during the period when this work was going on, was barred of her action for damages. Judge Peckham, writing in the case says: "In this there was no element of an estoppel. To constitute it, the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which

act or omission is inconsistent with the claim he proposes now to make. The other party too, must have acted upon the strength of such admission or conduct." See, also, *McMurray v. McMurray*, 66 N. Y. 176.

But we have already referred to a sufficient number of cases in this court to show how uniformly and frequently we have adhered to the doctrine where a legal right is involved, and upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, that the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defense to such an action. Such is also the doctrine generally of the elementary writers. 2 Pom. Eq. Jur., § 817; *Bigelow Estop.*, p. 476 et seq. The same general principle has also been held in England. In the case of *Fullwood v. Fullwood*, 9 Ch. Div. 176, Fry, J., says that "mere lapse of time, unaccompanied by any thing else, has, in my judgment, just as much effect, and no more, in barring a suit for an injunction as it has in barring an action for deceit." And the head-note in *Re Maddever*, 27 Ch. Div. 523, reads: "That, as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defense, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law."

The supreme court of the United States have also laid down the same rule in the recent case of *Menendez v. Holt*, 128 U. S. 523; 9 Sup. Ct. Rep'r, 143, where Chief Justice Fuller, writing for the court, says: "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder. *Attorney-General v. Eastlake*, 11 Hare, 205." Even in case where laches has been allowed to operate as a defense, the question is to be determined in the discretion of the court, upon all of the circumstances of the case. *Fullwood v. Fullwood*, supra. There is nothing in the history of this case

which induces us to suppose the court committed any error in the exercise of their discretion in granting the injunction appealed from. The plaintiff had reason to suppose the defendants would discontinue their trespasses, or, if they were continued, they would resort to legal means to justify them. They had no reason to believe that the defendants deliberately intended to prosecute their enterprise, altogether regardless of the legal rights of others, and were justified in delaying a reasonable time, in expectation that the defendants would eventually do justice to those whose property they were appropriating to their own use. The novelty of the questions presented; the vast number of people who were suffering similar injuries; the importance of the projected road for the public convenience—were all circumstances addressed to the discretion of the court upon the question of laches, and presented strong reasons why a strict rule should not be applied to the delay of the injured parties in seeking redress in this and similar cases. The rule requiring promptness in soliciting the intervention of a court of equity is always addressed to the discretion of the court, and varies much according to the situation of the parties, the nature of the relief demanded, and the circumstances of the case. *Calhoun v. Millard*, 121 N. Y. 32; 24 N. E. Rep'r, 27; *Fullwood v. Fullwood*, supra; *Rayner v. Pearsall*, 3 Johns. Ch. 578; *Atwater v. Fowler*, 1 Edw. Ch. 420. What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right, without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors, and condemning them to suffer remediless wrongs. The fact that the defendants intended to make their structure permanent, or made it so in fact, constitutes no defense to the action. *Krehl v. Burrell*, 7 Ch. Div. 551, on appeal, 11 Ch. Div. 146. For the reasons stated, we think the judgment appealed from should be affirmed, with costs. All concur.\*

**Railroads in streets—remedy of abutting owners—limitations.**—As to when an abutting owner is barred of any remedy for damages to his property by reason of a railroad upon the street in front of it, see *Porter v. Midland Ry. Co.*, 3 Am. R. R. & Corp. Rep. 357, and note; *Wells v. New Haven, etc., Co.*,

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\*Reported in 28 N. E. Rep'r, 479; 128 N. Y. 132.

1 Am. R. R. & Corp. Rep. 708, and note pp. 710, 719, 723; Harbeck v. Des Moines, etc., R. Co., 1 Am. R. R. & Corp. Rep. 449. The principal case is followed in Doyle v. Manhattan Ry. Co., 128 N. Y. 488; 28 N. E. Rep'r, 495.

# KERNOCHAN ET AL. V. NEW YORK EL. R. CO. ET AL.

(Court of Appeals of New York, Dec. 1, 1891.)

1. **ELEVATED RAILROAD IN STREET. RIGHT OF LESSOR TO RECOVER DAMAGES.** The owner of a city lot, which he has leased after the construction of an elevated road in the street in front of the lot, can maintain an action for damages for the impairment of his easement in the street by the existence and maintenance of the road during the time the lot was in the actual possession of his lessee, where the road has been built without condemning his easement in the street.

2. **DAMAGES ACCRUING AFTER DEATH OF OWNER.** Upon the death of such owner intestate, the right of action for damages, accruing after his death, vests in his heirs, instead of his administrator.

3. **EVIDENCE. EXAMINATION OF WITNESS.** In an action to recover damages from an elevated railroad company for damage to property abutting on the street in which the road has been erected, where an expert witness is asked what, in his judgment, is the amount of damage suffered by the property, a general objection to the evidence on the ground of incompetency is insufficient to raise the point that the question involves a fact not provable by opinion.

**A** PPEAL from superior court of New York city, general term. Affirmed. Action by James P. Kernochan and others against the New York Elevated Railroad Company and others to restrain defendants from maintaining their road in front of plaintiffs' premises, and for damages. Plaintiffs obtained judgment, which was affirmed by the general term. Defendants appeal.

*Samuel Blythe Rogers* for appellants. *G. Willett Van Nest* for respondents.

ANDREWS, J. This case, and several others now awaiting decision, present the question whether the owner of premises in the city of New York, who, after the construction of the elevated railroad in the street upon which the premises abutted, leased them for a term of years, can maintain an action for damages for the impairment of easements in the streets appurtenant to his premises, by the existence and maintenance of the road, suffered

during the period in which the premises were in the actual occupation of tenants under the lease, or whether the right of action is in the lessee. The case presents the further question whether, upon the death of the lessor intestate, the right to damages accruing from his death to the termination of the lease is vested in his administrators or belongs to his heirs, who, upon his death, succeeded to his title to the land. There is a further question of evidence to which reference will be made.

The question as to the respective rights of lessor and lessee under the circumstances stated, has occasioned considerable controversy, and has been argued in several of the cases before us with much ability, and this question will be first considered. The proposition that the structure of the elevated railroad invades property rights of owners of abutting property is no longer an open question. It is generally, if not universally, true that the structure is located in streets, the fee of which is in the city of New York. The building and operating of the road involves no actual entry upon the lands of the abutting owners, nor any injury to any corporeal hereditaments. The act of the defendant was not, therefore, a trespass upon land of another, as that injury is defined in the common law. It has been usual in these cases to denominate the injury to abutting owners a trespass. Every invasion of another's rights is such in a general sense, and in this general sense the word has been used as a convenient term to characterize the wrong committed. But the attempt to fasten upon this use an implication that the injury was one to the immediate occupier of the property, viz., to the tenant, rather than to the landlord, has no justification. In the Story Case, 90 N. Y. 179, the court, in speaking of the right of an abutting owner in the public street, said: "The right thus secured was an incorporeal hereditament. It became at once an appurtenant to the lot, and formed an integral part of the estate in it. It follows the estate, and constitutes a perpetual incumbrance upon the estate burdened with it. From the moment it attached the lot became the dominant, and the open way or street the servient, tenement."

The invasion of this incorporeal right by the structure of the elevated road is the *gravamen* of this and similar actions; and such an injury, although not a trespass upon land, has throughout the course of common law been remediable by an action for dam-

ages, technically known as an action of "trespass on the case." It is a fundamental proposition that only the party injured by a wrongful act can maintain an action for damages. There may be difficulty in some cases in ascertaining the proper party. The same wrong may occasion injury to several persons, or to separate and distinct interests in the same property. But, we repeat, he only is entitled to maintain an action who can show that his right has been invaded, and to such person or persons only is the wrong-doer bound to make compensation. The owner of real property, so long as he is in possession, and has not leased or created any subordinate interest in the land, plainly is the only person who has been injured by the construction and maintenance of the elevated railway. His easements, appurtenant to the land, have been invaded by the structure, constituting an injury to the inheritance, as distinguished from a mere temporary and casual wrong or trespass, not affecting the permanent value or use of the premises. It is true that the wrong is not permanent in the sense that it is irremediable. The structure may be voluntarily removed, or its removal may be compelled, on the application of abutting owners, and past damages may be recovered. Until the company shall have acquired by condemnation proceedings or voluntary cession the rights of abutting owners, the ordinary legal and equitable remedies are open to them. It is found as a fact that the defendants proclaim their intention to continue to maintain and operate the railroad, and this is a necessary inference from the situation. The character and purpose of the structure, the corporate powers and obligations of the defendants, the large amount expended in the enterprise, the right of condemnation given by the statutes, are conclusive not only that the defendants intend permanently to operate the road, but also of the fact that, when forced so to do, they will acquire the legal right as against all parties in interest. That under these circumstances the construction and operation of the road before any consummated right has been acquired by the defendants, whereby the owner of abutting property is deprived of the full enjoyment of his property, constitutes an injury to the inheritance, admits, we think, of no doubt.

In the present case the owner of the lot did not retain the full and absolute dominion, but carved out of the fee a term of years.

But by so doing he did not divest himself of his inheritance. He still had an inheritance in the land, technically a reversion. His prior absolute and unqualified estate was divided into two estates—one in the termor, the nature and quality of which is determined by the lease; and the other in himself. In determining whether the lessee acquired by his lease the right to recover damages inflicted upon the property by the road during the term, the situation at the time the lease was executed, the terms of the instrument, and the intention of the parties thereto, are to be considered. The first and most obvious consideration is that the lease was of the lot, and that, when made, the incorporeal and appurtenant easements in the street, to the extent that they had been taken or invaded by the elevated railroad, had been practically severed, though by wrong, from the abutting property. The part so taken away was not enjoyed in connection with the premises leased when the lease was executed. But still more material is the fact that the rent reserved in the lease was for the use of the lot in its actual situation. This is not stated in terms, but there can be no other reasonable inference. The road was then in the street, and was intended to be a permanent structure. It would be an unnatural and violent presumption that the lessor intended to exact, or that the lessee intended to pay, rent, measured by the value of the use of the premises without the railroad, on the supposition that it would be removed during the term. On the contrary, it is undoubtedly true that the rent reserved in leases like this represents in the minds of the parties the value of the use of the premises incumbered by the disadvantages of the railroad. The rent is diminished to the extent of the estimated injury to the rental value of the premises from this cause. In no other view, practically, could property built upon, and especially business property, be rented at all. Lessees usually desire leases of such property for a considerable period. The owner could not ordinarily rent from day to day, or week to week. The loss falls upon the lessor, and the continuance of the wrong during the term imposes no pecuniary loss upon the lessee. To hold that the right of action vests in the lessee, or to divide the claim between the owners of the two estates, would be contrary to justice and to the presumed intention of the parties.

There are many cases illustrating the principle before adverted

to, that the same wrongful act may affect distinct interests in the same property, and give a separate action to the several owners. It was held as long ago as the case of *Bedingfield v. Onslow*, 3 Lev. 209, that lessee and reversioner may each have an action for an injury resulting from the same wrong, each with respect to his particular estate. A reversioner, however, who by his lease has vested the immediate right of possession of the property in the lessee, sustains no legal injury from mere temporary or casual trespasses on the land. Such wrongs affect the possession merely, and are to be redressed at the suit of the tenant. But the construction of the elevated railroad in the street, without having acquired the easements of an abutting owner, if it has diminished the rental value of the property, is a wrong which, within the authorities, affects the inheritance, and gives the reversioner a right of action. He has been compelled to accept smaller compensation for the use of his property than he otherwise would have received, and to that extent has been deprived of its beneficial enjoyment. He has no absolute remedy to compel the removal of the structure, since the right of condemnation can at any time be exercised by the defendants. It has been held that an action lies by a reversioner for a wrongful obstruction of lights of his houses; for a permanent obstruction in the adjacent street; for obstructing a private way appurtenant to his premises; for preventing the access of tenants to a wharf; and for fouling a stream passing his lands upon which dye-works had been erected. *Jesser v. Gifford*, 4 Burrows, 2141; *Leader v. Moxton*, 3 Wils. 461; *Bedingfield v. Onslow*, supra; *Clowes v. Staffordshire Potteries W. Co.*, L. R., 8 Ch. App. 125; *Kidgill v. Moor*, 9 C. B. 364; *Bell v. Railway Co.*, 10 C. B. (N. S.) 287. See *Mott v. Shoolbred*, L. R., 20 Eq. 22; *Add. Torts*, 139. It is obvious, we think, within the authorities, that the lessor in a lease, made after the construction of the elevated railroad, of premises abutting thereon, can maintain an action for damages for the loss of rents occasioned thereby. The principle that diminished rental value is a basis for awarding damages has been frequently recognized in these and similar cases. *Francis v. Schœllkopf*, 53 N. Y. 152; *Tallman's Case*, 121 N. Y. 119; 23 N. E. Rep'r, 1134; *Drucker's Case*, 106 N. Y. 157; 12 N. E. Rep'r, 568; *Hussner's Case*, 114 N. Y. 433; 21 N. E. Rep'r, 1002; *Lawrence's Case*, 126 N. Y.



483; 27 N. E. Rep'r, 765. It is also a necessary deduction from the circumstances attending the making of ordinary leases of improved property, executed after the construction of the elevated railroad, that the right to recover damages is vested exclusively in the lessor. The circumstances and situation forbid the inference that the parties acted upon the presumption that the road would be removed or abandoned during the term; on the contrary, they act upon the presumption that the wrong will be continued, and the rent reserved is fixed upon this assumption. *Baker v. Sanderson*, 3 Pick. 348, was an action by a reversioner for damages for obstructing the plaintiff's mills, and it was alleged in the declaration that, in consequence of the obstruction, tenants had threatened to quit, and the plaintiff was constrained to make a reduction in rents. The court held that the declaration disclosed a good cause of action, and that a recovery by the plaintiff would be a bar to any action by the tenants for the same obstruction. In *Sumner v. Tileston*, 7 Pick. 198, the plaintiff sued the defendants for damages caused to the plaintiff's mill by the act of the defendant by raising a dam below. During the period for which damages were claimed, the mill for a time was occupied jointly by the plaintiff (the owner) and his son, and for another part of the time by the two sons; and in each period the plaintiff reduced the rent on account of the back-water. On the trial one of the sons was called as a witness by the plaintiff, and objection was taken to his competency on the ground of interest, which was overruled. On appeal the court held that the plaintiff was entitled to maintain the action, and on the question of the competency of the son as a witness, Parker, Ch. J., said: "He paid for the use of the mill according to the value of the rent, deducting the obstruction. He can have no action against the defendant for the same reason, viz., that he is not damnified." We should be very reluctant to make a decision which would expose the defendants to a double action in cases like this, and we are satisfied that the cause of action is entire, and is solely vested in the lessor. In a case where the lease was made prior to the construction of the road, different considerations would apply. Under such a lease the lessee is the party who would be entitled to maintain the action, for the same reason that we hold the lessor is entitled in the present case, viz., that he is the one who suffers

the injury. Other cases may be suggested, as for example, where a ground-lease is made either before or after the construction of the road, and the tenant makes erections upon the land; or cases where the lease is for such a long term as practically to amount to a fee. We will not anticipate what rule may be held in such cases. It is sufficient to say that they are not controlled by the present decision.

This court, in the recent case of *Pappenheim v. Railway Co.*, 28 N. E. Rep'r, 518, held that upon an absolute sale in fee of premises on a street through which the elevated railroad is constructed all right to damages subsequent to the conveyance by reason of the location and operation of the railway in the street vests in the grantee. This conclusion seems incontestable. The easements of an abutting owner, invaded, are appurtenant to his premises, and, in the nature of things, they are indissolubly annexed thereto, until extinguished by release or otherwise. They are incapable of a distinct and separate ownership. The owner of a lot cannot reserve them upon a sale, and they must, of necessity, pass as appurtenant to the premises, and with them passes to the purchaser, also the right to any remedy for their invasion. In the case of a lease, the easements remain annexed to the estate, not dissevered in fact or intention from the inheritance; and whether the general owner alone can assert a claim for damages, or whether both lessor and lessee have an action, will depend on the intention and the circumstances. The holding that the vendee acquires the right to all remedies for the future invasion of the easements, accomplishes substantial justice. Both the vendor and vendee knew that the owner of the land, as such, can compel the removal of the road from the street, or, as an alternative, that the company must institute proceedings for condemnation. Under such circumstances, the price obtained or given for the property would not ordinarily be regulated on the assumption that the wrong is to continue unredressed, or without compensation, but would naturally represent approximately the value of the land, as if no road had been built, or, what would be substantially the same thing, the value of the lot in its existing situation, supplemented by the value of the right which passes to the grantee with the conveyance to recover future damages, or, in case of condemnation, to receive full compensation for the easements taken. In

case of leases, especially leases for short terms, neither party expects that the wrong will be promptly righted; and in practice as well as theory the rent reserved represents the impaired value of the use. Both the rule declared in the Pappenheim Case and in this operate, as near as may be, to vest the right to compensation in the party who sustains the loss.

As to the second question, we entertain no doubt that, on the death of the lessor intestate, or having devised the land, the right to damages from the death of the decedent thereafter suffered, goes, with the title, to his heirs or devisees, as the case may be. The lessor, in his life-time, never had any claim to recover such damages, and his administrator or executor can have none. It might happen that no future damages would accrue. Upon the road being discontinued, or the structure removed, the liability of the company, except for past damages, would cease, and the owner, who had leased his premises for a term of years at diminished rent, upon the assumption that the road was to continue, would find himself in the position of having let his premises for what for the unexpired term might be an inadequate compensation; but this, we conceive, would entitle him to no remedy against the company. Such damages would not be regarded as flowing from the original wrong. While the wrong continues, the true principle is, we think, that, as between lessor and heir or devisee, the right to damages accruing subsequent to the devolution of the title of the lessor vests in those who have succeeded thereto. They sustain the injury, and not the decedent, or his estate. As owners of the reversion, they are entitled to the rents accruing from the decedent's death, and, if they are inadequate, and this is attributable to the wrong of the defendants, it is an injury to the reversion, and the reversioners at the time are the persons entitled to maintain the action.

The question of evidence arises on an exception to a question put to an expert witness for the plaintiff, similar to that recently considered in the Roberts Case (N. Y. App.), 28 N. E. Rep'r, 486, the allowance of which in that case was held to be error. The objection there was specifically taken that the question involved a fact not provable by opinion. Here there was only a general objection on the ground of incompetency. We have been inclined to hold, in view of the course of trials in these cases

against the elevated railway, that, although the general objection of incompetency made to a question put to an expert asking his opinion might be deemed, in ordinary cases, sufficiently specific, nevertheless to apply that rule in these cases would be unjust, because the objection, considered in connection with the course taken on these trials, would not fairly lead the court or counsel to suppose that the objection was aimed at the mode of proof, but rather to the competency of the fact sought to be proved. We think we should follow the instruction on the subject in the *McGean Case*, 117 N. Y. 219; 22 N. E. Rep'r, 957, and hold that the objection did not raise the point that the opinion of the witness was inadmissible. These considerations lead to an affirmation of the judgment. All concur, except Earl, J., dissenting. \*

1. *Elevated railroad in street—right of lessor to recover damages while possession in lessee.*—The propositions determined by the foregoing case are that, where an elevated railroad is constructed in a street and *afterward* a lease is made of abutting property, the presumption is, in the absence of stipulations in the lease to the contrary, that the lessee takes the premises subject to the burden or impairment caused by the railroad; that the rent is fixed upon that basis, and that, consequently, the landlord is entitled to recover any diminution in the rental value of the premises during the term caused by the maintenance of the road. The same propositions are affirmed in the following cases decided at the same time: *Hine v. New York El. R. Co.*, 128 N. Y. 571; 29 N. E. Rep'r, 69; *Mortimer v. Manhattan R. Co.*, 129 N. Y. 81; 29 N. E. Rep'r, 5; *Sterry v. New York El. R. Co.*, 129 N. Y. 619; 29 N. E. Rep'r, 68.

But where the lease is made *before* the construction of the road, the loss manifestly falls upon the tenant, and he may recover the diminution in rental value accruing during the term. This was held in the following case decided at the same time as the foregoing: *Kearney v. Metropolitan R. Co.*, 129 N. Y. 76; 29 N. E. Rep'r, 70. Both phases of the question were presented and decided in this case, as the plaintiff took a lease of the premises in question *before* the construction of the defendant's road and sub-let the premises *after* its construction.

2. *Rights of remaindermen while possession in life tenant.*—The construction and operation in a street of an elevated railway being an injury to the inheritance of the abutting property, an action for damages caused thereby, and to enjoin its further use, may be maintained by the remaindermen of the premises obstructed, Code of Civil Procedure, section 1665, providing that "a person seized of an estate in remainder or reversion may maintain an action founded upon an injury to the inheritance, notwithstanding an intervening estate for life or for years;" and section 1681 providing that where, during the pending of an action by a remainderman, "defendant commits waste upon or

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\* Reported in 29 N. E. Rep'r, 65; 128 N. Y. 559.

does any other damage to the property in controversy," an injunction may be granted restraining further damage. *Thompson v. Manhattan Ry. Co.*, 130 N. Y. 360; 29 N. E. Rep'r, 264.

## BOHM ET AL. V. METROPOLITAN EL. RY. CO. ET. AL.

### SOMERS V. SAME.

(Court of Appeals of New York, Jan. 20, 1893.)

1. **ELEVATED RAILROAD IN STREET. SUIT BY ABUTTING OWNER FOR DAMAGES. QUESTIONS OF PRACTICE.** On a trial by the court of issues as to the measure of damages to realty, exceptions to the refusal of the court to find certain facts which were established by uncontradicted testimony, where such refusal shows the adoption of an erroneous rule as to the measure of damages, with exceptions to the denial of a motion for nonsuit on the ground that no damages have been proved, are sufficient to enable the court on appeal to review the question as to the proper rule for measuring damages.

2. **MEASURE OF DAMAGES FOR TAKING OR INTERFERING WITH EASEMENTS OF LIGHT, AIR AND ACCESS.** The easements of light, air and access which an abutting owner has in a street have no value apart from the abutting property; and where they are taken by the construction and maintenance of an elevated road in the street their value is to be measured by the injury which such taking inflicts on the abutting property, and with reference to the agency by which they are taken; and where it appears that the construction and operation of the road has benefited the abutting property, and increased its value, which would not have been so great except for the building of the road, or where it appears that the road has not prevented the natural increase in value, the abutting owner has received no damage, and there can be no recovery. The fact that the increase is common to all the property on the street, and greater in proportion to property on the side streets than that on the street in which the road is constructed, is not material

**A** PPEALS from superior court, New York city, general term. Actions by Nathan Bohm and others and by Peter Somers against the Metropolitan Elevated Railway Company and the Manhattan Railroad Company to recover damages caused by the construction and operation of defendants' elevated railroad in the street abutting the premises of the respective plaintiffs. Defendants' appeal from judgments affirming judgments for plaintiffs. Reversed.

The other facts fully appear in the following statement by Peckham, J.:

These two cases were argued together, as involving only the same questions. The plaintiffs in the actions brought suit to recover damages which they alleged they had sustained by reason of the operation of the railway of defendants through Second avenue in the city of New York. The plaintiff Somers was the owner, by conveyance to him in March, 1882, of certain premises known as "Nos. 2271 and 2273," on Second avenue in that city, and between One Hundred and Sixteenth and One Hundred and Seventeenth streets. He alleged that the defendants had unlawfully interfered with, trespassed upon and illegally taken his easements (or some portion thereof) of light, air and access to his property by the illegal erection and operation of their elevated railway in such avenue. He demanded judgment restraining defendants from further maintaining their structure in front of his premises, and compelling them to remove the same. He also asked to recover the amount of his damage already sustained by reason of the maintenance and operation of the road past his premises, and that, if defendants were permitted to maintain and operate the road in the future, it should only be upon the condition that they should pay plaintiff the amount of the permanent loss he would suffer by reason of such maintenance and operation. The plaintiff Bohm made substantially the same allegations in relation to his property, which was also situated on Second avenue, and a short distance from plaintiff Somers. The defendants answered, and particularly put in issue the allegations in the complaint in each case as to the damages resulting from the acts of defendants. Both actions were tried at a special term of the court without a jury, and the court among other matters, found the following facts. They are in substance the same in each case. In the Somers Case: The defendants were duly incorporated, and before they proceeded to construct their railroad through Second avenue they obtained the authority of the legislature and the consent of the municipal authorities of the city of New York to do so, but such authorization did not entitle them to take the property of plaintiff without compensation. In 1883, and prior to April 1, the plaintiff erected on his lots two large and valuable brick buildings, and to them and to the lots on which they rested were attached as appurtenant thereto certain easements of light, air and access from Second avenue. Since April 1, 1883, the ele-

vated railway structure of defendants has greatly cut off the light, air and access which otherwise would have come to plaintiff's premises from that avenue. By the acts of defendants in depriving the plaintiff in part of the beneficial use and enjoyment of his easements above mentioned from April, 1883, to the time of trial, April, 1890, the rental value of plaintiff's premises has been reduced \$2,100, and the plaintiff has sustained a loss thereby to that amount. The damage is of a continuous character, arising from the maintenance and operation of the road by defendants. The road was opened for public use in March, 1880, and has been ever since so maintained and operated. The permanent damage caused by the operation and maintenance of defendants' road was found to be \$3,000, upon payment of which no injunction was to issue. The money was only to be paid in case the plaintiff conveyed to the defendants all the rights and easements appurtenant to his lots, which had been taken by them. In the Bohm Case the same general facts were found, differing only as to the different lots, and as to the amount of damages. Judgments upon the decisions of the judge were duly entered, and the defendants appealed therefrom to the general term, where the judgments were affirmed, and from the judgments of affirmance the defendants have appealed to this court.

*John F. Dillon and Julien T. Davies* for appellants. *Charles Gibson Bennett* for respondents.

PECKHAM, J. (after stating the facts). The defendants seek upon these appeals to obtain from this court some decisive statement as to the rule which should obtain in actions like these in arriving at the amount of damages which should be paid by defendants to abutting lot-owners on account of the building and maintenance of defendants' roads in the city of New York. To that end they have waived every other exception in the cases. There are, it is said, large numbers of cases in which the decision of the question is of the greatest importance to both parties. The defendants claim that if the correct rule for the ascertainment of damages had been followed in these cases, the uncontradicted evidence showed that plaintiffs had not sustained any damage whatever. At the outset the plaintiff's counsel sets up a bar to our entering upon an examination of the subject by alleging that

the question is not raised, and that there is no exception which brings the matter before us. In the Somers Case the defendants requested the court to find as follows: "*Twentieth*. The existence and operation of the defendants' railroad in Second avenue has greatly increased the population of the locality in which the plaintiff's property is situated, and has brought traffic into Second avenue. The plaintiff's property has thereby incidently been benefited. *Twenty-first*. Since the year 1880 there has been a general rise in the value of real estate situated upon Second avenue, and this increase in value is largely attributable to the existence and operation of the defendants' railroad." Substantially the same requests were made in the Bohm Case. These requests, the defendants state, are founded upon uncontradicted evidence. Upon a careful perusal of the evidence in the cases I think this contention is well founded. The court refused to make the findings as requested, and the defendants excepted. Motions were made by the defendants in each case for a dismissal of the complaint on the merits, because, among other grounds, it appeared the plaintiff's property had been benefited by the railroad, and had increased in value since its erection, and by reason thereof. The motions were denied, and exceptions taken. We think, upon the whole, that the question was sufficiently raised.

It is true that exceptions are unavailing when they are taken to the refusal of a judge to find as facts matters which are merely evidence, and which are immaterial. In these cases, however, we must remember that the sole question at issue between the parties upon this branch of the case was as to the proper rule to be observed in ascertaining the amount of damages the plaintiffs had sustained, if they had sustained any. The amount of damages would be materially affected by the rule which should be observed in determining their existence; and yet in making the bare finding of the amount of damage sustained, it would not appear that any particular rule had been followed, and hence it would not appear that any erroneous rule had been adopted. It might in such cases be urged, perhaps, that there was no evidence upon which to base a finding of damage if a correct rule had been adopted, and yet a perusal of the testimony might show some slight amount, and hence the exception would fail. The judgment might at the same time be really founded upon the incorrect rule. There



would in almost any event be a difficulty in determining whether a wrong rule had or had not been adopted. If it were a trial by jury, the judge would be requested to instruct the jurors as to the true rule, and an exception would lie to his refusal and to the rule actually adopted, and the question brought up in that way. In a trial before the court it is more awkward. The requests in these cases were to find certain facts which had been established by uncontradicted evidence, and upon those facts the defendants seek to draw an inference in the nature of a conclusion of fact or of law, or both, that the plaintiffs have sustained no damage. The court has, in truth, refused to find the facts as requested, and such refusal, added to the circumstance that he has found the plaintiffs have sustained substantial damage, and to an amount stated by him, leads to the inevitable conclusion that he refused to find them because they were, in his judgment, immaterial. A request to find that the plaintiffs had sustained no damage, or a motion for a nonsuit on the ground that no damage had been proved, might not alone bring up the question. Taking all the means together which the defendants adopted in their perfectly legitimate attempt to bring up for review the question as to what is the proper rule of damages in these cases, we must say that, if their able counsel has not yet succeeded, it is difficult to see how success in that line can be achieved hereafter. Without overruling the cases upon the subject of exceptions to refusals to find upon mere matters of evidence, we think the cases before us are distinguishable.

The question sought to be raised here is so difficult of presentation by way of exception or request upon a trial before a court or referee, and is withal so important, that we are disposed to say the various requests to find, and the exceptions taken to the judge's refusals, together with the motion for a nonsuit on the ground that no damage had been proved, and the exceptions taken to the denial of such motion, should in these cases and under the circumstances be regarded as sufficient to enable us to review and pass upon the question on its merits. Justice we think demands this.

Although these are suits in equity, commenced to obtain equitable relief, and to prevent the defendants from operating their road unless they pay the plaintiffs the damages they will sustain from the permanent interference by the railroad with their ease-

ments of light, air and access, yet the rules upon which such damages are to be awarded are so far well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases. This rule was last announced in this court in the recent case of *American Bank Note Co. v. New York El. R. Co.*, 29 N. E. Rep'r, 302 (not yet officially reported). What rule obtains in this State in condemnation proceedings, and in regard to the kind of property which has been taken by the defendants in these cases, is now made the subject of inquiry. Generally, in regard to the taking of land, the rule may be said to be to pay the full value of the land taken at its market price, and no deductions can be made from that value for any purpose whatever. Then as to the land remaining, the question has been to some extent mooted whether the company should pay for the injury caused to such land by the mere taking of the other property, or whether, in case the proposed use of the property taken would depreciate the value of that which was not taken, such proposed use could be regarded, and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. I think the latter is the true rule. *Henderson v. Railroad Co.*, 78 N. Y. 423, 433; *Newman v. Railway Co.*, 118 N. Y. 618; 23 N. E. Rep'r, 901; *In re Brooklyn El. R. Co.* (Sup.), 8 N. Y. Supp. 78. The case of *In re New York El. R. Co.*, 36 Hun, 427, is cited for the other rule. The question might be of great importance where there was an injury to the remaining land, but if there has been no injury, the inquiry as to the scope of the liability for damages is not material. There is no question made but that the defendants are liable to pay the full value of any property taken by them, subject to no deduction whatever.

How the value of the particular kind of property which is here taken shall be arrived at is the main, and indeed the only question in these cases. Included in that inquiry and growing out of it, arises the question, shall only special benefits to the remaining property be regarded, or may what is termed "general" benefits be also taken into consideration? Before entering on a discussion of these matters, I think it proper to say that I should hesitate to

admit the correctness of the claim made by defendants, that where private property is taken by a mere business corporation as for a public use, under the granted power of eminent domain, the legislature could provide that such property could be paid for by benefits accruing to the land-owner's adjacent property, consequent upon the taking. This is the case in regard to municipal corporations where land is taken for a public street or other public and municipal purpose, and where the benefits arising to the adjacent lands of the owner whose property is taken may be set off against the value of the land taken. So in the case of property taken by the state for canal or other public purposes, where the owner of the land taken was frequently paid its value by the benefits received to his adjacent land not taken. The principle underlying these cases is, however, the right of the municipality or state to tax the owners of the land left in order to pay for the land taken, on the ground that they are specially benefited by the taking, and hence should be specially taxed for the payment of the land. The case of *Genet v. City of Brooklyn*, 99 N. Y. 296; 1 N. E. Rep'r, 777, is no authority for a contrary view, for I think it supports that which I have suggested. A mere trading or business corporation has no power of taxation, and the state could not delegate such power to it. If such company desire another's property, it must pay a just compensation for it; and that just compensation would not consist in its doing the owner some benefit upon his remaining property. The question, although argued by appellants' counsel, or, rather, perhaps stated, becomes unimportant, and is, therefore, undecided here, because the statute provides for just compensation for the property taken, and prohibits any deduction therefrom on account of real or supposed benefits accruing to the property which is not taken. The defendants, so far as regards this question, make no claim of restricted liability to pay such full value. In determining the question now presented it is well to recur briefly to the character of the property which is taken, and the circumstances under which it has been taken. The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence, when under legislative and municipal authority the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no land of theirs was

taken, and any damage they sustained was indirect only, and *damnum absque injuria*. When the courts acquired possession of the question, and it was seen that abutting land, which, before the erection of the road, was worth, for instance, \$10,000, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless, by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work. It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street.

These rights of obtaining for the adjacent land facilities of light, etc., were called "easements," and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property, and protected by the constitution from being taken without just compensation. It was held that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent land-owner, and in law took a portion of them. By this mode of reasoning the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and, therefore, not collectible from the defendants, was overcome. The interference with these easements became a taking of them *pro tanto*, and their value was to be paid for; and, in addition, the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendants' road. For the purpose of permitting such a recovery, the taking of property had to be shown. The Cases of Story, Lahr, Drucker, Abendroth and Kane (the last of which is reported in 125 N. Y. 164; 26 N. E. Rep'r, 278, and in which the others are referred to) finally and completely settled these matters.

It seems to me plain from this review of the law that the real injury (if any) suffered by the land-owner in any particular case lies in the effect produced upon his abutting land by the wrong-

ful interference of defendants with these easements of light, air and access to such land; and where they are interfered with, and, in legal effect, taken to any extent, it is not possible to think of them as of any value in and of themselves, separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant. This is a consequential damage. It is not the light or the air that is valuable, separated from the land adjoining. With regard to the subject under discussion, there is and can be no value in a given quantity of air or space or light in the public street, except as it may be used in connection with and as appurtenant to the abutting land. When a person interferes with such light, air or access, and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land. This loss, while purely consequential, is nevertheless a liability which the person proposing to take the property is bound to discharge.

The rule which the counsel for the plaintiffs contends for is a pure abstraction, and liable in many instances to cause injustice in its application, because it would fly in the face of the actual facts. Easements, he says, are worth exactly the amount which they add to the value of the premises to which they are appurtenant; and no reference to the particular agency by which the taking or interference with such easements has been accomplished should be permitted, even for the purpose of determining the damage that has been thereby caused. The pure abstraction of a curtailment or destruction of the easement must be indulged in, and no effect other than such curtailment or destruction upon the property left is to be regarded. Carrying out this principle, it might appear that a lot on Second avenue, with its easements of light, air and access unimpaired, would be worth \$5,000. To deprive it in some undefined way other than by defendants of a portion of such easements equal to the amount taken by the defendants might detract from the value of the lot \$2,500. Therefore, \$2,500 is the value of the easement, which the defendants must pay. This is, as I have said, a pure abstraction. No such case exists or can exist. The same property cannot be taken by some other agency and by the defendants at the same time. Adopting the theory of the plaintiff's counsel, it can be easily seen how, in

fact, the injustice imagined might be perpetrated. A plaintiff, after proving that the damage to his property, if the easement had been taken by some process and by some person other than defendants, would upon such hypothesis have been \$2,500, might be met by defendants with proof of the fact that he had sustained no damage whatever, and, on the contrary, by reason of the erection of the road, he had been specially and peculiarly benefited, his property being in actual fact worth fifty or one hundred per cent more than it was before. Would there not be great injustice in awarding to such an owner \$2,500 for damages which in truth he had never suffered? The separate value of light and air, upon the facts existing in all these cases, can, in the nature of things, be nothing but nominal. They must be joined to the land to be of value. A theoretical course of reasoning may be adopted, by which it could be claimed, as plaintiff's counsel urges, that the value of these easements, in and of themselves, is represented by the amount of depreciation in value to the adjoining land their taking would occasion, with no reference to the agency by which such taking was accomplished. In fact, such value would be arrived at by reference to what was a purely consequential damage to land. If the taking by the railroad actually had the effect of enhancing the value of the remaining land, the inquiry as to the amount of loss that might otherwise have been occasioned (if there had not happened to be the actual benefit) would be the purest guess and speculation in the world, and, even when arrived at, would be but proof of what might have happened if something else had not occurred which prevented it, and caused the contrary to happen. To permit a recovery of this conjectural and wholly theoretical amount of damage which was never sustained would be to legalize a mere raid upon the treasury of defendants.

The real question to be considered is in truth one of damage to the abutting land. *Newman v. Railroad Co.*, 118 N. Y. 618; 23 N. E. Rep'r, 901. What facts may be regarded upon such an inquiry has not been finally decided. In the Case of *Newman*, *supra*, a portion of the subject was involved and discussed, and we must recognize the authority of that case upon the question actually therein decided. A reference to the report is necessary in order to learn that fact. That action was brought and tried as one to recover the whole damage in one action which the plaintiff had

sustained by reason of the erection and operation of defendants' road in front of his premises in Church, near Rector street. The court was asked to charge the jury "that in estimating the damages to the leasehold interest in this plaintiff, caused by the interference by the defendants with the light, air and access appurtenant to the premises, the jury may take into consideration any benefits peculiar to his house which have arisen by the construction of the road, as shown by the evidence." The court refused to charge as requested, and said: "On the contrary, the jury have no right to take any such fact into consideration." There was an exception to that refusal, and upon appeal this court, in the second division, held that such refusal was erroneous, and, therefore, the judgment was reversed, and a new trial granted. The so-called "Rapid Transit Acts," under which the defendants were organized, provided that the commissioners of appraisal should not, in determining the amount of compensation, make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad. The Case of Newman decides that this provision does not mean that, in examining the question whether injury has resulted to the abutting owner's remaining land by reason of the taking of a portion of the easements spoken of, the court cannot regard the fact that, so far from injury, the land remaining has been specially enhanced in value by reason of the taking. On the contrary, it decides that such fact of special enhancement in value is material, and may and must be considered upon the question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited may be proof that it has not been diminished in value. If it would have increased still more in value but for this taking by the road, that difference it must pay, because to that extent there would be damage. The Newman Case is authority for the proposition that the easements are only of nominal value, in and of themselves, and that the result of taking them must be looked for in the effect upon the adjoining land. If, instead of loss or injury, that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the land-owner. Although adding nothing to the weight of the

authority of the Newman Case, I must say that, as far as it goes, the decision receives my unqualified approval.

The remarks of the learned judge in the latter part of the opinion as to general benefits from the growth of the city, etc., were no part of the decision itself, and were merely suggestions as to matters not really involved in the case. They raise the question as to how far general benefits to the land may be regarded, and also whether, assuming them to exist, they must have been caused by the railroad company, in order to be noticed. I shall add a word or two later on upon that subject. At any rate the case decides that it is a defense to the action to recover damages if it be proved that in fact the owner's remaining land has been specially benefited by the taking. In these cases there is no claim that plaintiffs have received benefits from the taking which were special and peculiar to their lots and not shared in by the owners of lots generally in the avenue. I confess I have been and am wholly unable to see the least materiality in the distinction between what are termed "special" and "general" benefits to the property left, or whether such benefits have been caused by the defendants. Strictly speaking, it is not a question of benefits at all, except that proof of benefits may be one way of showing there has been no injury. The value of the easements taken, we have seen, was merely nominal; and the sole question which remains is, therefore, has the owner suffered any damage or injury whatever which has been caused by this taking? for, if there has been no damage, there can be no recovery. To ascertain the fact whether there has been damage, an excursion into the realms of possibilities as to what might have happened, but did not, is not permitted. The inquiry whether the land would have been injured if certain circumstances had not occurred, which not only prevented such injury, but enhanced its value, is wholly immaterial. The question is, what, in fact, has been the actual result upon the land remaining? Has its actual market value been decreased by the taking, or has the taking prevented an enhancement in value greater than has actually occurred; and, if so, to what extent? The amount of such decrease in the value of the remaining land, or the amount of the difference between its actual market value and what it would have been worth if the railroad



had not taken the other property, is the amount of the damage which the defendants should pay. If, on the contrary, there has been neither decrease in value caused by the railroad, nor any prevention of an increase from the same cause, how can it be truly said that the lot-owner has been injured to the extent of a farthing? The absence of injury may have been the result of the general growth of the city, by reason of which the particular property has grown in value with the rest of the city. It is the fact, not the cause, which is material. Where it appears that the property left has actually advanced in value, unless it can be shown that, but for the act of defendants in taking these easements, it would have grown still more in value, the fact is plain that it has not been damaged.

It is said the lot-owner is himself entitled to the benefits accruing to him from the general rise of property, caused by a general growth of the city in that vicinity; and that the causes of such growth are too indefinite and uncertain and problematical to permit the railroad to take advantage of it upon the question of damages. Of course, if the lot-owner is entitled to the benefits arising from these sources I propose to take no course which shall rob him of them. None other ought to, or in fact can, have them. It is not a question of permitting the lot-owner to have these benefits. How is he despoiled of them when, upon an inquiry whether he has sustained damage from the conduct of the defendants, it clearly appears that he has not? If it appear that he would have sustained damage but for the fact that the general growth of the city in that direction prevented it, and caused an increase in value, what materiality lies in the fact that this growth was not caused by the railroad? As I have already remarked, the fact that there has been no damage is the material fact, and not the reasons which in truth prevented the injury from occurring. If it did not occur, then clearly the lot-owner has suffered nothing. He receives all the benefits attaching to the general growth of the city which causes the enhancement in value of his own lots; but he is not permitted to recover from defendants alleged damages, which in fact he has never sustained.

In the other view, what is to be the rule or measure of damages which is to prevail? Is the owner to be permitted to recover as

damages the amount which it is guessed at or surmised he would have sustained by the depreciation in value of his land if it had not been for the fact that it had in truth increased in value? What semblance of justice would there be in such a rule? The only possible injury which the defendants could cause him by their action lies in the injury they might do his remaining land. An investigation of that question reveals the fact that this land has actually increased in value since the taking spoken of, and the fact is not claimed or proved that it would have increased as much but for such taking, and yet, by a course of what may be called "abstract reasoning," the defendants are to be compelled to pay such a plaintiff an amount of money as representing damages he never suffered. Any reasoning, abstract or otherwise, which permits such a result, is lame somewhere. The defendants are not, however, compelled to base their claims of exemption upon quite so broad a foundation. They say it appears by the uncontradicted evidence that the railroad largely caused the increase in value of all the lands on Second avenue, including the plaintiffs' lots; and, as I have said, the evidence bears out such claim. If this be the fact, how can it be said that the plaintiffs have suffered damage? There is no shadow of evidence that, if the defendants had not taken this property and built their railroad, the property of the plaintiffs would have been as valuable, or any thing like as valuable, as it is. The plaintiffs have in truth been specially benefited by this railroad, although quite a number of others have also participated therein. This special cause is the railroad, and a special benefit may result to many from such special cause. The fact that other property in the vicinity and in the side streets has been more than proportionately increased in value by reason of the existence of the defendants' road is not of the slightest importance upon the question of whether the plaintiffs have been injured by defendants' conduct. The probability is very high that the property in the side streets would have been immeasurably below what it now is in value but for the operation of these elevated roads. The same high degree of probability exists in regard to the property on Second avenue, as is gathered from the evidence of witnesses in these cases. It is, however, abundantly clear from the evidence actually given that the property of plaintiffs has not suffered injury or damage by the wrongful acts of

the defendants; and where the plaintiffs have in fact sustained no loss it is no hardship which prevents their recovering any thing from defendants. The plaintiffs, upon a new trial, and under this view of the rule of damages, may, perhaps, be able to show they have nevertheless suffered damages from the illegal action of the defendants. It is only necessary for us in this case to decide that, if the property of the plaintiffs has increased in value since the taking of these easements, or a portion of them, and if such increase is largely due to the building and operation of the defendants' road, and if such increase would not have been greater but for the action of defendants, then the plaintiffs have suffered no damage. Whether the increase is common to every other owner in the avenue, and is greater in proportion with some owners of property in the side streets than with the plaintiff, are matters of no importance. The plaintiffs are not damaged because their neighbors are benefited to an even greater extent than they are by the defendants' road.

It is not necessary to refer to the adjudications in other states upon this subject. This is a matter upon which we must be controlled by our own views of the meaning of our own laws, and of what is consistent with a proper construction of them. It is, too, a work of supererogation to cite and comment upon, separately, the various cases decided in this and other courts of our own state during the last forty years upon the subject of damages in condemnation proceedings. We are quite familiar with them and their conclusions, and we think we do not depart from the general trend thereof in laying down our own views in these cases now before us. The Newman Case, *supra*, stands as authority for the principle upon which we must proceed in our examination of the question of the value of these easements.

Upon the further question as to the consideration to be given the fact of "general benefits" (so called) which have been caused by the railroad company, we are confident that the rule herein laid down is calculated to do full justice to both sides, and is in entire harmony with the language and meaning of the statute providing for the taking of property under the rapid transit acts. The rule permits a recovery by the abutting owners of the full amount of the actual damage sustained by them, while at the same time it will not permit such owners to recover, by some theoretic-

cal or abstract mode of reasoning, alleged damages, which in plain truth they have never suffered.

The case of *Francis v. Schoellkopf*, 53 N. Y. 152, has no bearing on the question whatever. The language of the head-note is a contradiction in terms. The rental value of a house cannot at the same time be injured and enhanced. The offer of proof was in regard to dwellings in the vicinity, and proof that their rental value was increased was no answer to the proof that in the plaintiff's case the effect of the nuisance was to decrease the rental value of his own property. It is of course, plain that the modifying words of the opinion were inadvertently dropped from the head-note, a slip which will sometimes happen in spite of all the vigilance that can be exercised.

After a careful consideration of the subject, we think it appears that errors occurred upon the trial of these actions which demand the reversal of the respective judgments, and they are, therefore, reversed, and a new trial granted in each of the above-entitled actions, costs to abide the event. All concur, except Gray, J., not voting.\*

#### EMINENT DOMAIN — ELEVATED RAILROADS IN STREETS — RECENT DECISIONS.

1. *The principal case explained and distinguished — damages by diminishing the natural increase in value.*— In the principal case it is held that where the construction of an elevated railroad in a street has had the effect of increasing the values of land in a particular locality, so that land abutting on the street is worth more than it would have been if the road had not been built, then the property is not damaged and it makes no difference that the road has caused a still greater advance in property upon side and parallel streets. In other words the owner has no legal ground of complaint because the company has not benefited his property in the same proportion as it has some other property in the neighborhood. In subsequent decisions the court has explained that it did not intend by the principal case to change the rules of damages or to lay down new ones. If the advance in the abutting property has been due to other causes and not to the railroad, and if the advance has not been as much as it would have been without the railroad, then it is manifest that the railroad has had an injurious effect upon the property and the owner has sustained legal damage. This has been so held in *Becker v. Metropolitan El. R. Co.*, 131 N. Y. 509; 30 N. E. Rep'r, 499; *Storck v. Metropolitan El. R. Co.*, 131 N. Y. 514; 30 N. E. Rep'r, 497. In the former case the court says: "We intend to fully adhere to the rule of damages as laid down in the *Bohm Case*. The owner's land must have received some injury, caused by the

\* Reported in 30 N. E. Rep'r, 802; 129 N. Y. 575.

taking of the easements and the erection and operation of the road, in order to permit a judgment in favor of the plaintiff. If the land has been depreciated in value from what it originally was before the taking, that fact is evidence of damage. If it has not increased in value to the same extent that it would have done but for the erection and operation of the road, that is a fact which shows damage. The mere fact that the appreciation of the land on the avenue has not been as great in proportion as in the side streets is not sufficient to show any damage to the land on the avenue, for the increase in value in both localities may have been produced by the road; and in that event, as we have said, the failure of defendant to enhance the plaintiff's land in value as much as land on the side streets does not show any damage to the plaintiff's land. What we now say is that evidence that the value of land on the avenue has not increased in the same proportion as land on the side streets is admissible, and may be considered in connection with the other evidence in the case upon the question of fact whether the land of the owner has increased in value to the same extent that it would have done but for the presence of the road. And we intend that the defendant shall have the full application of the rule that what has been termed 'general' as well as special benefits to the property shall be taken into consideration in deciding the fact whether or not the owner has been injured by the road."

In the *Storck Case* the court further says: "In the *Bohm Case*, for the first time, it seemed necessary for this court to lay down a rule as to damages in cases of the taking of the easements of abutting property-owners, in connection with or as influenced by evidence of benefits to the abutting property, caused by the introduction of this new kind of railroad communication. So it was held that if the evidence showed no injury, but only benefits, to the abutting owners, in actual increase of fee and rental values of their property, then it would not be permissible to conjecture as to results, nor just to uphold a claim of damage resting in pure theory, and not upon facts in the case. The easements for an illegal taking of which the abutting owner can claim compensation have not, as it was said by Judge Peckham, 'any value in and of themselves, separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant.' Hence, as the damage is consequential in its nature, it is deemed to follow that if the abutting property has been benefited, though deprived of easements in and over the street, and the owner is unable to sustain his allegations of damage by any proof, for the court to allow his demand would be contrary to legal principles, and unjust. So far the decision of the *Bohm Case* goes, generally speaking, and it rests upon its particular facts. It was not intended, in that decision, to disturb any settled rule of law in damage cases, but to define and prescribe the application of the rule in the presence of such a new state of facts as these cases are exhibiting. The value of the easements taken must be measured, not abstractly, and in theoretical ways, but practically, and by the effect which the appropriation of the easements has upon the property to which they were appurtenant. \* \* \*

"The argument of the appellants' counsel advances the proposition that, as there was, in fact, an increase or appreciation in the value of plaintiff's property since the defendants came into the avenue with their railroad, the plain-

tiff has not been damaged, and that the fact that the property in the side streets, or in parallel avenues, has been more benefited, furnishes no evidence of injury. The decision in the Bohm Case does not justify the argument to the extent probably intended here. The reversal of the judgment in the Bohm Case proceeded distinctly upon the utter absence of any facts from which an inference of damage to the plaintiff was legitimately permissible. It was not claimed or proved in that case that the land would have increased as much but for the construction and operation of the defendants' railroad, and it was held that, if the determination could only be reached and sustained by 'abstract reasoning' as to what was the value of these easements of themselves, and as separated from the abutting property to which appurtenant, then the plaintiff should fail in his demand for compensation in damages. In the present case, however, as I have said, there were facts in evidence from which the trial court, finding that the appreciation in value of the plaintiff's property had not kept pace with that of his neighbors, might conclude that it had been prevented by causes solely attributable to the acts of defendants. In the nature of their acts and in the character and degree of the effects produced, as well as in the relative course of property values, there was a sufficient foundation for the decision of the learned trial judge. In connection with the other facts in this case, evidence of an insufficient increase in value of property, might as properly be considered in determining the question of damage as though the evidence showed a depreciation in value. The property which is taken is not corporeal, but consists in certain rights or easements which the law concedes to the owner whose property abuts upon and ends at the line of the street, in and over the street. When by such an occupation of the street under governmental sanction there results an impairment of those rights, the question, upon a claim for compensation in damages for the trespass, goes directly to the facts of the case. If there is proof that benefits have resulted in a general appreciation of property values in the locality, it is quite competent for the complainant to show in evidence that these benefits have not been invariable, and that in his particular case they were insufficient, as compared with other property similarly situated, or in the neighborhood; and that the insufficiency is due to the mode, manner or extent of the defendants' occupation of the street. He is entitled to prove that his property has not equally or proportionably shared in the general rise in values in the locality; and that fact, with the other facts in evidence tending to prove damage, may properly be considered in determining whether he has been adequately compensated for the deprivation of his easements. In each case the question is, what damage has actually been sustained in the deprivation to the abutting owner of these easements? and some facts must be given in evidence to support a finding of actual damage or none can be inferred. I have said more than this appeal necessitated, but I have done so because of the importance of questions which may frequently arise in this class of cases."

2. *Damages to entire lot extending from street to street.*—In 1882 plaintiff bought certain land, extending from one street to another, which was occupied by a four-story brick building having a single roof, no transverse partition, and only one flight of stairs between the first and second stories. During seventy-six years prior to 1895 said land consisted of two lots, one fronting on each street, and had separate owners; but since that year it has been owned,

used, described and conveyed as a single lot fronting on both streets. In an action to recover damages for injuries caused by the use and occupation by a railroad of one of the streets on which the land abutted, it was described as one lot, owned by plaintiff, and damages were claimed for injuries done to it as an entirety. Held, that a judgment for plaintiff would not be disturbed on the ground that the land consisted of two lots, and that damages were improperly recovered for injuries to both. *Stevens v. New York El. R. Co.*, 130 N. Y. 95; 28 N. E. Rep'r, 667.

3. *Benefits.*—The benefits to the abutting property by the railroad should be considered in estimating the damages, and it is reversible error to exclude evidence of such benefits. *Odell v. New York El. R. Co.*, 130 N. Y. 690; 29 N. E. Rep'r, 998. See, also, *Becker v. Metropolitan El. R. Co.*, 131 N. Y. 509; 30 N. E. Rep'r, 499; *Storck v. Metropolitan El. R. Co.*, 131 N. Y. 514; 30 N. E. Rep'r, 497.

4. *Evidence and elements of damage.*—Damages may be awarded for diminution in the rental value of the property due to defendant's obstruction of the street while it was constructing its road. *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96; 26 N. E. Rep'r, 1043.

Where the testimony showed that the railway had diminished by the amount awarded the rents which would have been realized for the ordinary use of the property, requests to find that the house was used as a house of prostitution, and that for such purposes the rental value had not been diminished, were properly refused as immaterial. *Lawrence v. Metropolitan El. Ry. Co.*, 126 N. Y. 488; 27 N. E. Rep'r, 765.

It is error to permit a witness to testify as to what, in his opinion, "is the best use to which the property could have been put if it had not been for the elevated railroad and this interference." *Gray v. Manhattan Ry. Co.*, 126 N. Y. 499; 28 N. E. Rep'r, 498.

Evidence as to the effect of the railroad on other property in the same street is admissible. *Doyle v. Manhattan Ry. Co.*, 128 N. Y. 488; 28 N. E. Rep'r, 495. Where part of plaintiff's property is used for business purposes, evidence as to the effect of the railroad on the business of the street is admissible for the purpose of showing that plaintiff's property was benefited by the construction and operation of the road. *Id.* Upon the former point the court says: "It was proper for the defendants to show the general effect of the road upon abutting premises. Much of the damage which the plaintiff claimed was caused to her premises, if it was actually caused to the extent claimed by her, must have been common along the avenue in the vicinity of her premises, and proof of the effects upon other premises not too distant from hers should have been received. The court may, undoubtedly, in such a case, in the exercise of its discretion, limit the number of witnesses to be called, and may confine the examination of the witnesses to the premises in the vicinity, giving a reasonable range. But it cannot properly confine the examination to the particular premises in question and exclude all proof offered as to the general effects upon other premises."

Where the court sustained defendant's objection to evidence of the permanent injury, and ruled that damages should be recovered for injuries to the time of the trial, and the trial proceeded on that theory, the defendant making no objection, held, that defendant, by acquiescing in this ruling, waived the

right to object to the exclusion of evidence that the value of plaintiff's property had increased, or to the refusal to charge that damages could be recovered only for permanent injury, or for injuries to the time the action was begun. *New York El. R. Co. v. Fifth Nat. Bank*, 185 U. S. 432; 10 Sup. Ct. Rep'r, 432.

5. *Opinion evidence.*—In *Roberts v. New York El. R. Co.*, 128 N. Y. 455; 28 N. E. Rep'r. 486, it is held in an elaborate opinion, that it is incompetent for a witness to state the amount or extent to which abutting property is damaged by an elevated railroad in the street in front of it. The question asked and permitted to be answered was: "To what extent, in your judgment, is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?" For error in permitting this question to be answered, the judgment in the case was reversed. Gray, J., and Ruger, C. J., dissented. The court says: "A sufficient number of cases has been cited on both sides, I think, to place fairly before us the different reasons for the different views which would exclude or permit evidence of this nature to be laid before a jury. There can be no doubt, as I have already observed, that the great weight of authority both in the supreme court and in this court is against the introduction of this evidence. And, indeed, there is no reason why it should be introduced. Expert evidence of the actual value of real estate is proper and in many cases essential. The present value of the property of the plaintiff can be proved by expert evidence, both the value of the fee and the rental value. Both classes of value could also be proved by expert evidence, as of a time immediately prior to the building of this road. They are opinions based on facts which now exist or which once existed, and if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under circumstances which never existed, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which when once stated, an ordinarily intelligent jury can draw as just and fair an inference of a possible, yet conjectural, value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide. The opinion of the expert, if of the least value, would have to be based upon an intelligent consideration and knowledge of the value of other property as nearly as may be similarly situated, in about the same quarter of the town and under nearly the same circumstances, but without the presence of a railroad of the nature of the defendant's in front of the property. All this information he could easily impart to the jury."

The *Roberts Case* has been followed and approved in several subsequent decisions. *Doyle v. Manhattan Ry. Co.*, 128 N. Y. 498; 28 N. E. Rep'r, 495; *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499; 28 N. E. Rep'r, 498; *Kernochan v. New York El. R. Co.*, 128 N. Y. 559; 29 N. E. Rep'r, 245. In all these cases, including the *Roberts Case*, it is held that the opinions of witnesses as to what the value or rental of the property would have been, if the road had not been constructed, are inadmissible as involving matter of pure speculation.

6. *Question of interference with rights of abutting owners not for jury to determine.*—The erection of an elevated railroad in a city street, without the consent of the abutting owners, and though the fee of the street is in the mu-



nicipality, is, in itself and as matter of law, an interference with such owners' rights, and the question of such interference is not one to be left to the jury for determination. *Williams v. Brooklyn El. R. Co.*, 136 N. Y. 96 : 26 N. E. Rep'r, 1048.

### GRIFFITH V. GREEN ET AL.

(Court of Appeals of New York, Jan. 20, 1908.)

1. CORPORATIONS. LIABILITY OF STOCKHOLDERS FOR FAILURE TO FILE CERTIFICATE. INCREASE STOCK. The general manufacturing act (Laws of New York, 1848), making the individual stockholders of a company liable for a failure of the company to file a certificate showing that its capital stock has been paid up in full, is in derogation of the common law, and must be construed strictly. So, where it appears that such certificate of the original issue of stock has been filed, and that there was a subsequent issue of increased stock, no liability for want of a certificate with respect to such increase can attach to a member of the company until it is proved that he is holder of a part of the increased stock.

**A**PPEAL from the supreme court, general term, second department. Action by Silas L. Griffith against Andrew H. Green and others, executors of W. B. Ogden, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

*Walter Farrington* for appellant. *Mornay Williams* for respondents.

GRAY, J. The plaintiff was a judgment creditor of the Miller-ton Iron Company, a domestic corporation, organized under the general manufacturing act of 1848, and, failing to obtain satisfaction by execution upon his judgment, commenced this action to enforce against the defendants, as stockholders, the liability imposed by the statute upon such, for the failure to file the proper certificate of payment upon an increase of the capital stock. The defendants were executors of William B. Ogden, deceased, who, in his life-time, had been the holder of two hundred and twenty-three and one-half shares of the company's capital stock. It is not disputed that the original stock, and a first increase of the capital, were fully paid up, and the required certificates of the fact duly filed; nor that, upon subsequent issues of increased capital stock, such certificates were either defective or wanting. It also did appear that the whole capital, as increased, had as matter of fact, been paid in. The ques-

tion is whether the plaintiff made out a case sufficient to charge the defendants with any statutory liability for such subsequent defaults to comply with the statute, and is purely technical. Looking at the allegations of the complaint, in the first place, we find that it sets out the several promissory notes made by the company, and delivered to the plaintiff; their non-payment at maturity; the recovery of judgment thereupon, and the return of execution unsatisfied; the several increases of capital stock, and the failure to make and record certificates of the payment of the capital stock, as prescribed by sections 10 and 11 of the act, except as to the first increase of stock. The allegations as to the testator's holding of stock are that he "was the owner of some of the original stock of said company, and continued to sell and purchase shares of stock up to the time of his death, \* \* \* at which time he was the owner of two hundred and twenty-three and one half shares," etc.; and it is alleged that such shares are a part of his estate, and that, at the time the debt was contracted, and of the commencement of the action, the defendants were stockholders, holding the said two hundred and twenty-three and one-half shares. It is nowhere alleged that the testator, or his executors, these defendants, held any of the issues of increased stock; and the plaintiff did not prove upon the trial, as a part of his case, that any part of these two hundred and twenty-three and one-half shares was of those later issues, the legal regularity of which was affected by the failure to comply with the statute. In order to make out a good cause of action, the plaintiff should have alleged in his complaint that the shares held by defendants were, in whole or in part, as the case might be, of the increased stock. The mere averment as to their holding so many shares of the capital stock, or of the trading by testator in the stock, through sales and purchases, up to his death, was not sufficient. It would not necessarily follow as a legal conclusion that any of the increased stock was held by the defendants, and the statutory liability inheres only by such a holding. But no objection seems to have been taken to the sufficiency of the complaint, and we are concerned only with the sufficiency of the proof in the case as made. Upon the trial, the plaintiff made no attempt at any proof with respect to the shares of stock held, except through a stipulation of the defendants admitting their testator was a stockholder and owned

shares of stock in the year the company was incorporated, "and continued to own shares of stock in said company down to the time of his death, and that his estate has ever since his death, and now owns, two hundred and twenty-three and one-half shares of stock." But plaintiff argues that this admission, coupled with the fact that the testator was a trustee of the company, and signed various notices to increase the capital stock, constituted a sufficient foundation for holding the defendants liable, or at least sufficient until they overthrew a resulting presumption of liability. The point of his argument seems to be that there is a general liability upon all stockholders for the occurrence of such acts of omission by trustees as are here depended upon, because the increase is a corporate act.

There is nothing in the argument, and the statute never intended that the consequences of a failure to file the required certificate of payment upon an increase of the capital stock should be visited upon any but those who held it.

In the case of *Veeder v. Mudgett*, 95 N. Y. 295, the question of the liability which the statute imposes for the failure to file a proper certificate upon an increase of the capital stock was fully considered. It was held that such a liability attached only to those who held the increased capital, and that it has no reference to and no effect upon the original capital and its holders. Judge Finch, who delivered the opinion there, summarized by saying that "it is the increase which is subjected to the liabilities of the act, and as a consequence, only the holders of that increase to the par value of that stock who are liable for debts. The innocent holder of full-paid stock, once discharged by law, because his duty was done, goes free, as he should." It is not possible to see why the decision in that case should not control here. It obviously is authority for the proposition that the burden is upon him who seeks to enforce this statutory liability to allege and to prove that the conditions of the statute are exactly met by the case. The principle is unquestionably right, and it is one which underlies all cases where a liability is sought to be imposed which is in derogation of the common law, and arises solely by reason of some legislative enactment. The statute here must be read with some respect to the object in view, and it is then apparent that strictness harmonizes with reasonableness of construction. The pro-

visions with which we are now concerned were intended as protection to those who have dealings with the corporation. They justify them in relying upon the fact that the whole authorized capital has been paid in, in time and manner as prescribed by the statute; and, if that fact is not certified to in the way there pointed out, then the holders of stock as to which a certificate of full payment has not been filed are made severally liable to the creditors of the company. The requirements of the law as to the payment in of the company's capital, and as to the filing of a certain certificate, are reasonable, and strictness in compliance is demanded in the interests of creditors and of stockholders. Whenever there is the failure to comply with such statutory conditions, the creditor's attack is confined to enforcing the precise consequences which are attached to the failure. Applying the principle here, the consequences of the omission to file a certificate as to the payment of the increase of capital were to subject, not the holders of the capital stock which had been fully paid up, and as to which there was no statutory default, but the holders of the new issue of capital stock, to liability for corporate debts. As was suggested in *Veeder v. Mudgett*, the statute does not operate to revive any liability as against the holders of stock in the issue of which the demands of the statute have been properly complied with; it only subjects the increase of stock to the same liabilities as the original stock and its holders were under. In our judgment, therefore, unless the stockholder proceeded against is proved to hold some of the increased stock, he is not brought within the statute. In this record it does not appear of what kind was the stock held by the testator, and which passed to his personal representatives; and it is not a case for the indulgence of presumptions, or for the basing of inferences. Under the statute there must be precise proof that the statutory default affected the shares held by the defendants. The shares left by testator were, of course, part of the whole capital; but not necessarily, nor presumptively even, of the several issues increasing its amount. For the reasons here assigned, the judgment should be affirmed, with costs. All concur.\*

**Stockholders—statute making them liable to creditors until capital paid in and certificate filed.**—See *McDowell v. Sheehan*, ante, p. 210, and note.

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\* Reported in 29 N. E. Rep'r, 838; 129 N. Y. 517.

## FIRST NAT. BANK OF JERSEY CITY V. LAMON.

(Court of Appeals of New York, Second Division, Dec. 22, 1891.)

1. CORPORATIONS. LIABILITY OF TRUSTEES FOR FAILURE TO FILE ANNUAL REPORT. EXCUSE. CEASING TO DO BUSINESS. A corporation closed its business in December, 1886, but it did not appear that it could not resume its business. Two of the four trustees applied to the attorney-general to bring an action to dissolve the corporation. The action was commenced January 15, 1887, and was opposed by the other trustees. A receiver was appointed March 7, 1887. Held, that the trustees were not relieved from the duty imposed on them by law to file the annual report in January, 1887.

2. PRACTICE IN COURT OF APPEALS. Where the referee finds that a defendant, who is sought to be charged as a trustee for failure to file such annual report, was a trustee at the time, and the general term does not disturb such finding, it will not be disturbed by the court of appeals.

**A**PPPEAL from supreme court, general term, first department. Action by the First National Bank of Jersey City against Archibald Lamon to recover a penalty. From an order of the general term reversing a judgment in favor of plaintiff, entered on a report of a referee, and granting a new trial, plaintiff appeals. Reversed.

*Hamilton Wallis* for appellant. *W. J. Townsend* for respondent.

**BROWN, J.** This action was brought by the plaintiff, a creditor of the Atlantic Steam Engine Works, a corporation organized under the general manufacturing act, to enforce a personal liability of the defendant as a trustee of such corporation for failure to file in January, 1887, the annual report required to be filed by the twelfth section of the act referred to. Two defenses are made to the action: *First*, that the defendant was not a trustee of said corporation at the time of the default in filing the report; and, *second*, that the trustees were under no obligation to file a report in January, 1887.

It appeared upon the first defense that the defendant was elected a trustee in the year 1880. No subsequent election was ever held. He testified that after the expiration of a year from his election he had nothing to do with the affairs of the company other than to perform his duties as foreman of the shop, which

consisted in laying out the work and hiring men. He never attended any meeting of the trustees, and was not notified to attend any, and was never consulted by the officers about any business of the corporation. It appeared, however, that in December, 1886, an application was made to the attorney-general to bring an action to dissolve the corporation, which was opposed by the defendant, and upon the hearing before that officer the defendant made and read an affidavit, in which he swore that he was a trustee of the corporation, and referred to the officers thereof as his co-trustees. That the attorney-general having commenced an action to dissolve the corporation, a motion was made therein for the appointment of a receiver, which motion was opposed by the defendant upon his affidavit, in which he reiterated the statement that he was a trustee. Upon the trial of this action the defendant testified that he did not understand when he signed and swore to said affidavits, that he was making a statement that he was at that time a trustee, but intended to state, and supposed that he had stated, that he was once a trustee of the company. The weight to be given to the defendant's explanation of the affidavits was for the trial court to determine. He was not bound to hold over after the expiration of the term for which he was elected, and he was not bound to act after that time, but he might with the consent of the stockholders do so. His affidavits were to the effect that he had held over; and the referee's conclusion having been adverse to the defendant, and the general term not having reversed that finding, we cannot say that there is no evidence to sustain it. We must, therefore, accept as established the fact that the defendant was a trustee at the time default is alleged in the filing of the report.

The general term sustained the second defense. The facts upon which that defense rests are undisputed, and are as follows: The corporation ceased work in its shops between the 10th and 15th of December, 1886. The cause of the suspension is not stated. The buildings were locked, and the men in its employ were discharged, and after that time no work of any kind was done. On December 29 application was made to the attorney-general by two of the four trustees to bring an action to dissolve the corporation. The hearing was adjourned to January 6, 1887, and on January 15 an action was commenced. Neither the grounds of

the application to the attorney-general nor the grounds of the action commenced by him appear. On January 18 an order was granted, returnable on the 20th to show cause why a receiver of the corporation should not be appointed, which order restrained creditors from issuing executions against the company's property; and on March 7, 1887, a receiver was appointed. The question presented is, was the corporation, under the circumstances stated, relieved from making and filing the annual report? This court had decided that on the appointment of a receiver of a manufacturing company the corporation is so far dissolved that thereafter the duty is no longer upon the trustees to make the report (*Bank v. Studwell*, 74 N. Y. 621); and that, when the corporation has been practically abandoned, the requirement as to filing reports does not apply to the trustees. *Losee v. Bullard*, 79 N. Y. 404; *Bruce v. Platt*, 80 N. Y. 379; *Van Amburgh v. Baker*, 81 N. Y. 46. In *Losee v. Bullard* the default was alleged to have been made in 1873, and it appeared that the corporation had suspended business in 1865, and never resumed, and had contracted on debts after that time. In *Bruce v. Platt* the alleged default was in January, 1875, but more than a year previous all the property of the corporation had been sold under execution, and from that time the corporation had no property or business, no means of procuring money, and no ability or intention of resuming business. The result of these cases is summed up by Judge Danforth in *Kirkland v. Kille*, 99 N. Y. 390-395; 2 N. E. Rep'r, 36, as follows: "When the condition of the company is such that the end and object for which it was formed are destroyed, and there is neither an ability nor intention on its part at any time to further prosecute its business, it is no longer required to make the report mentioned in section 12 of the manufacturing act."

This case does not fall within the rules enunciated in any of the cases cited. The corporation was not in the hands of a receiver at the time of the default. Nor does the evidence show that it was insolvent. Nor had its franchise been abandoned. On the contrary, it appears that the notes held by the plaintiff had been given in September and October, 1886, and matured subsequent to January 20, 1887, and up to December 15 it was engaged actually in the prosecution of its business. At the time it closed its shops the defendant testified that it owned real estate and other

property of the value of \$60,000, and about the same time it borrowed a large sum of money from the Brooklyn Bank, and gave a mortgage to secure such loan upon its property; and that it was then solvent, and had a large surplus over and above its debts. The action to dissolve the corporation was opposed by two out of the four trustees, and there is nothing in the evidence to indicate that the object for which it was formed was destroyed or abandoned, or that there was not ability to resume its business. Under these circumstances, the trustees were not relieved from the duty imposed by the statute to file the annual report. In *Sanborn v. Lefferts*, 58 N. Y. 179, the defendant was sued as a trustee for failure to file a report in January, 1870. It appeared that in October, 1869, the trustees had resolved to discontinue business, owing to the embarrassed condition of the company, and wind up its affairs, and that in the early part of January its property was sold. This court decided that these facts did not exempt the trustees from the statutory consequence of a failure to file the prescribed report. The facts in *Sanborn v. Lefferts* were stronger for the defendant than in the case before us. Here there was no action by the corporation with a view to the discontinuance of business or abandonment of its franchise, nor was there acquiescence in such a course by the trustees or stockholders, and we are of the opinion that the mere fact of an application by the attorney-general at the instance of two of the trustees for a dissolution of the corporation upon the grounds undisclosed, so far as this action is concerned, and in view of the active opposition thereto by half of the trustees, did not relieve them from the duty of making and filing the annual report. The order of the general term must be reversed, and the judgment entered on the referee's report affirmed. All concur, except Potter, J., not voting.\*

**1. Corporations — liability of officers for failure to make report as required by statute.**—Statutes making the officers, directors or trustees of a corporation liable for certain classes of its debts in case of failure to make a report of its condition in accordance with the statute, are not uncommon. The statutes are stated and their construction and application discussed at length in note to *Gaus v. Switzer*, 2 Am. R. R. & Corp. Rep. 708, 711. As to what will excuse the making of the report, see section 8 of note, page 716.

**2. Under such statutes, a false report cannot be treated as no report.**—Gen-

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\* Reported in 20 N. E. Rep'r, 321; 130 N. Y. 306.



#### 444 BRITTON V. GREEN BAY AND FT. H. WATER-WORKS CO.

eral Statutes of Colorado, section 253, require every corporation to make an annual report stating the amount of its capital, the proportion thereof actually paid in, and the amount of existing debts; and it provides that a failure to file this report shall render the directors and trustees jointly and severally liable for the debts of the company contracted during the year preceding the time for filing it. Held, that where a report is actually filed, the fact that it is false will not render them liable under this section as upon failure to file any report at all. *Matthews v. Patterson*, 16 Col. 215; 26 Pac. Rep'r, 812. To the same point, 2 Am. R. R. & Corp. Rep. 717, § 7 of note.

3. **Liability for knowingly signing false report — scienter.**—Section 253, General Statutes of Colorado, provides that all the officers who have signed such false report, knowing it to be false, shall be jointly and severally liable for all damages thereon arising. Held, that in an action to enforce this liability, the complaint is demurrable where it fails to state that officers knew the report was false. *Matthews v. Patterson*, 116 Col. 215; 26 Pac. Rep'r, 812. See *Huntington v. Attrill*, 1 Am. R. R. & Corp. Rep. 418.

4. **Statute requiring reports and accounts to be posted each month — action for penalty.**—In an action for a penalty against a gold mining company brought under Statutes of California, 1880, page 134, which provides that such corporation shall on the first Monday of each month make and have posted in the office of such company certain reports and accounts current for the previous month, an answer denying the allegation of the complaint that said company had an office for the transaction of business is insufficient to raise a material issue, Civil Code, sections 290, 321, contemplating that all corporations shall have a place of business. *Chapman v. Dovay*, 89 Cal. 52; 26 Pac. Rep'r, 605.

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#### BRITTON V. GREEN BAY AND FT. H. WATER-WORKS CO.

(Supreme Court of Wisconsin, Jan. 12, 1902.)

1. **WATER COMPANY. INSUFFICIENT SUPPLY OF WATER. LIABILITY FOR FIRES.** A contract on the part of a water company with a municipal corporation to supply the "city and the inhabitants thereof with water for public and private uses, for public and private consumption, and for putting out fires," establishes no contract relations between the company and private persons, and creates no liability on the part of the company to respond in damages for losses caused by its failure to supply a sufficient quantity of water for the extinction of fires.

2. The fact that such provisions of the contract formed a part of an ordinance of the city could not create any such liability on the part of the company to private persons, the company being bound only by the obligations of the contract which it had voluntarily assumed.

**A** PPEAL from circuit court, Brown county, Samuel D. Hastings, Jr., judge. Action by David W. Britton against the Green Bay and Fort Howard Water-Works Company. From a

judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

*Greene & Vroman* for appellant. *J. C. & A. C. Neville* and *Ellis & Merrill* (*F. C. Winkler*, of counsel) for respondent.

ORTON, J. The demurrer to the complaint, on the ground that it did not state a cause of action, was sustained, and this appeal is from said order. The material facts stated in the complaint are substantially as follows: The water-works of the respondent company, in the city of Green Bay, were completed in 1887. Water-mains were laid throughout the city, and one hundred and sixty double-nozzled hydrants thereon were located at different points, and one of them in the vicinity of the property of the plaintiff hereinafter mentioned. The mains and hydrants were connected with two direct pressure pumping engines, as the power to furnish water for fire purposes and of sufficient capacity, and that could be used singly or together, and supplied by four first-class boilers. The property of the plaintiff in such vicinity of the mains and hydrants consisted of certain lots, on which were mills, cooper-shops, sheds and other structures, and certain personal property therein, such as staves, heading and other materials and things, all of great value. In November, 1890, a fire broke out in one of said sheds, and gradually spread until all of the sheds and other property were burned or damaged to the value and amount of \$18,884.88. The fire was discovered in its incipency, and the fire department was promptly on the ground, with all the necessary means and appliances to put it out before such damage occurred, and would have done so if the defendant company had furnished water to the mains and hydrants for such purpose, according to its agreement with the city of Green Bay, as hereinafter stated. But on account of the pumping machinery, steam-boilers and other appliances having become so defective, out of order and insufficient, through the negligence of the defendant, or were so negligently used by the defendant, there was not sufficient pressure on the mains or water in the hydrants in the vicinity of said property for such purpose, and said property was, therefore, burned or damaged as aforesaid. It is charged, in effect, that the defendant neglected to furnish water, through and by its

works, to the city of Green Bay, so that said city could and would have put out said fire before it had so damaged or destroyed the property of the plaintiff.

The provisions of the ordinance of the city, the acceptance of which constituted the contract between the defendant and the city for the construction of said water-works, material to the case, are as follows: The franchises granted to the company as the consideration of the agreement to do what the ordinance requires are: *First*, "to use the streets, alleys, public sidewalks, public grounds, streams and bridges of the city for placing and repairing the mains, hydrants, water-pipes and other structures of the water-works;" *second*, "to charge and collect rates for furnishing the inhabitants of said city with water for private use." Besides the construction of the water-works as above, the company is required "to supply said city, and the inhabitants thereof, with water for public and private uses, for public and private consumption, and for putting out fires."

First, the learned counsel of the appellant contend that by the language of the ordinance the water-works company entered into contract relations with the inhabitants of the city, as individuals, to supply them, or for their use and benefit, water for public use, and for public consumption, and for putting out fires. Such does not appear to be the meaning of this language. It is not that the company shall supply the city and the inhabitants thereof with water jointly, and for the same purposes and uses. The city and the inhabitants are by this general language joined together, but it is followed by distributive uses and purposes appropriate to each — to the city, for public uses and consumption and for putting out fires; and to the inhabitants, for private use and consumption. It will hardly be claimed that the company is to supply the individual inhabitants with water to put out fires by this peculiar language. They can, if they choose, use the water for such purpose, or to put out their own fires in their own way, but that right is given by another clause of the contract. The company shall furnish the inhabitants with water for private use, and may charge and collect rates therefor. If both the city and the inhabitants are given the right to water for putting out fires generally, their rights would clash; and, besides, such a right is a public one, and in no sense private. Such public use of water

would be supplied to the inhabitants generally as to the public, but the above language does not require the company to supply the inhabitants with water, even in this sense. The inhabitants are mentioned only in respect to their private use of water. This is in accordance with the *gravamen* of the complaint, that the defendant company neglected to furnish the city water to put out the fire that consumed the plaintiff's property, and that the fire department of said city would have extinguished and prevented the spread of the fire but for the negligence and carelessness of the defendant. It is too plain for argument that the plaintiff has no contractual relations with the defendant in respect to being supplied with water to be used in putting out this fire. One of the breaches is that the fire-hydrants were not kept supplied with water for fire service. The fire department of the city only could use the hydrants for such purpose.

It is not alleged in the complaint, any further than reciting the above language of the ordinance, that the defendant contracted with or for the plaintiff, or that it owed any duty to the plaintiff, or that the defendant had assumed any contract, legal or moral obligation, toward the plaintiff, to supply water to put out this fire or any other, and yet it is now claimed by the learned counsel of the appellant—*First*, that the defendant is liable to the plaintiff for the breach of this contract; and, *secondly*, for neglect of duty. The matter of contract being out of the question, it remains only to consider whether the defendant is liable to the plaintiff for the neglect of any duty it owed him, under the facts stated in the complaint. Such duty, if it exists at all, must be merely inferential from the facts stated, and, as it is not defined or alleged in the complaint, the field of inquiry is very wide.

We will consider briefly the various grounds of the defendant's liability to the plaintiff, in view of the facts which the learned counsel of the appellant claim they have found in this wide field of inquiry.

*First.* It is said that this ordinance has the force of law, and that, therefore, what it requires the company to do is required by law. That would be so if the city had the power by ordinance to require the company to construct and operate these water-works irrespective of any contract by which it has agreed to do it. The law or ordinance cannot compel the com-

pany to do any thing except what it has contracted to do. We can find no duty of the company here. The company is bound only by the obligations of the contract which it has voluntarily assumed, and they are measured by the contract.

*Second.* The company, in carrying out its contract with the city, is liable for injuries to third persons. That is so in cases when the company, in doing any thing required by the contract, is brought into such relations with third persons or the public as to create a duty toward them; as if the company, in laying down the pipes or mains, should, by its negligence or that of its employes, allow them to fall upon and injure some third person, or one of its employes, as in *Robinson v. Rohr*, 73 Wis. 436; 40 N. W. Rep'r, 668, and other cases cited under the first point of appellant's brief. This duty is very different from the obligation of the company to perform its contract. It is the common duty of every one not to injure another by his negligence, and not confined to cases of contract. Any person who undertakes to construct public works must not, by his negligence in doing it, injure others.

*Third.* By a contract with another, a person may assume a duty toward other persons. The authorities cited to this point relate to cases where, in carrying out a contract, a person assumes a special and personal duty to those for whose benefit the contract was made, as where a parish employs a physician to attend to certain dependent persons and he injures such persons by his malpractice, he is liable to such persons, and they may bring an action against him; or as where a person is employed by the owner to drive his carriage, in carrying passengers, and by his negligence a passenger is injured, he is liable to such passenger. In such cases a contracting party is placed in such relation with others as to assume a duty toward them. The physician undertakes to treat a person carefully and skillfully, and he is liable for not doing so to the patient himself, although he may have been employed by others to do so. In carrying out his contract with one he comes in contact with others, to whom he assumes a new and special liability. In such cases the person injured by the neglect has no contract relations with the physician or the driver, and their liability does not arise from the contract made with others, but from new relations with and duty toward such persons, and from a new and personal undertaking with them.

*Fourth.* The law requires the company to furnish water to put out fires, for the benefit of the inhabitants; and the plaintiff, being one, may sue the company for damages for not having done so. We have already seen that the law does not require the company to do so, any further than the law requires the company to perform its contract. We have seen, also, that the plaintiff is neither a party or privy to the contract.

*Fifth.* Where the law requires any thing to be done for the benefit of the public, any one suffering peculiar injury by the failure to do it may sue, as in the case of the law requiring a railroad company to fence its road. This is also inapplicable, because the law does not require the company to do any thing outside or beyond the terms of its contract.

*Sixth.* Where two persons contract for the benefit of a third person, such third person may sue on the contract, and enforce it for his own benefit, as where A. owes B., and B. owes C.; A. contracts with B. to pay the money directly to C.; C. may then enforce the contract, and, after he has had notice of it, A. and B. cannot rescind it. In such case the assent of C. is necessary, either by actual notice or by suit. It will be seen that the whole matter is that of contract between A., B. and C. Here the company has not promised or contracted to perform the obligations of its contract to the plaintiff, or any other one except the city, the other contracting party.

The learned counsel of the appellant have in this way searched for principles on which this action would lie, and have failed to find a single one applicable to the case. The defendant is not only not required by law to furnish water to put out fires, but has assumed no such duty to the public by its contract. It has contracted to do so not because it was its duty to the public, but because it deemed it profitable to itself, and was willing to be thus bound by its voluntary contract. It seems to be impossible to find any sound legal principle on which the liability of the defendant to the plaintiff can be predicated; and the learned counsel of appellants, with all their ability, research and ingenuity, appear to have been unable to find any. This court has held that the city itself would not be liable in such a case even on the strength of its duty to the public. *Hayes v. City of Oshkosh*, 33 Wis. 314. Could the defendant have reasonably supposed that by this contract with the

city it was contracting with or incurring liability to each one of its inhabitants, and that it might be sued by each one individually and separately? If one enter into a contract with another, must he look to see who else might possibly in some way be remotely interested in it and injured by its breach? There would be no end to such a liability. If one contract with a city to build, in a certain time, a bridge over a river within its boundaries of great public necessity, and he should fail to do so within the time fixed, by the same principle each one of the inhabitants who had suffered some appreciable damages in consequence of the delay, might bring an action against him; and so in a great variety of similar cases. By such a liability the established law of contracts, and the measure of damages on the breach of contracts, would be unsettled and left in endless uncertainty. The parties to a contract are those who are directly interested in it, and who have assented to it and none are bound by it except the parties and privies, and there must be mutuality. The damages for the breach of a contract must be legal, natural, immediate, proximate and direct. Remote damages are not recoverable. These are well-established principles which would be violated by such a liability, and the law cast into confusion. Is it a hardship that the plaintiff cannot recover in such a case? So it is in case the city is sued for the neglect of its duty in not furnishing the necessary machinery for putting out fires. It is no greater hardship in one case than in the other. The duty of furnishing water and using it to put out fires still remains in the city. That duty has not been, if it could be, transferred to the company. The company is bound only by its contract, and liable to the city alone, as the other contracting party, on the contract. Nor does the company perform the functions of a public office so as to be liable for its negligence causing private damage. We have attempted to reason from elementary principles that such a liability does not exist. *Paducah Lumber Co. v. Paducah Water-Supply Co. (Ky.)*, 12 S. W. Rep'r, 554, seems to be the only case in point in favor of such a liability. We are not satisfied with the reasons given in that case for so holding. In all other cases where the same or similar question was involved the decision has been the other way. The following cases are against such a liability: *Davis v. Water-Works Co.*, 54 Iowa, 59; 6 N. W. Rep'r, 126; *Becker v. Water-Works*, 79 Iowa, 419; 44 N. W.

Rep'r, 694; *Atkinson v. Water-Works Co.*, 2 Exch. Div. 441; 21 Moak's Eng. Rep. 541; *Nickerson v. Hydraulic Co.*, 46 Conn. 29; *Foster v. Water Co.*, 3 Lea, 42; *Fowler v. Water-Works Co.*, 83 Ga. 219; 9 S. E. Rep'r, 673, 674; *Beck v. Water Co.* (Pa. Sup.), 11 Atl. Rep'r, 300; *Ferris v. Water Co.*, 16 Nev. 44. It will be seen that the English and American courts are nearly unanimous in discarding this principle of liability in cases of the same class. The principle contended for by the able and learned counsel of the appellant is almost an entire stranger to our common-law jurisprudence, and has so far failed to obtain recognition except by a single American court. The argument of the learned counsel in favor of the action rests almost entirely, as we have seen, on principles claimed to be analogous in cases well sustained by the courts. But they are not analogous, but distinctively different. The court has no disposition or tendency to ingraft new, strange and radical principles on the body of our well-established law, under the false guise of progress to meet the spirit of the age. Principles which reason has established, and long experience has sanctioned, are very apt to be the best that legislative and judicial wisdom can devise, and the safest criterion of judicial action. The learned circuit court decided correctly that the complaint failed to state a cause of action based upon reasons clear and conclusive. The order of the circuit court is affirmed.\*

**Water supply companies—liability for loss by fire resulting from an insufficient supply of water**—Where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the tax-payers of the city, and by the terms of the city ordinance, which the water company accepts, the water company agreeing "that it will pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the company to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the water company," there is no such privity of contract between a citizen or resident and the water company as will authorize him to maintain an action against it for the injury or destruction of his property by fire, caused by the failure of the water company to fulfill its contract. *Mott v. Cherryvale Water & Mfg. Co.* (Kans.), 28 Pac. Rep'r, 969. To the same effect is *Becker v. Keokuk Water-Works*, 79 Iowa, 419; 44 N. W. Rep'r, 604. See, also, *Wiley v. Inhabitants of Athol*, 150 Mass., 426.

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\* Reported in 51 N. W. Rep'r, 84.



## UNION BLDG. ASSN. V. ROCKFORD INS. CO

(Supreme Court of Iowa, Oct. 24, 1891.)

1. **FIRE INSURANCE. NON-PAYMENT OF PREMIUM. LOSS PAYABLE TO MORTGAGEE. ESTOPPEL.** An insurance policy was issued with a provision that the loss, if any, should be paid to the mortgagee of the insured property, and that it should not be of any effect until the premium should be paid; and the policy was sent to the assured, at his request, with directions to remit the premium. The assured sent the policy to the mortgagee, but never paid the premium, of which failure the mortgagee had no notice. The policy contained a recital that the premium had been paid. Held, that the company was not estopped to set up such non-payment in an action by the mortgagee on the policy.

2. **ASSIGNMENT OF ERROR. SUFFICIENCY.** An assignment of error which states that the court excluded evidence offered to prove a certain fact is sufficiently specific, and it need not show the name of the witness, and the questions the answers to which were excluded.

**A**PPPEAL from district court, Jones county, J. H. Preston, judge. Action on a policy of insurance. The petition shows that on the 16th of October, 1888, the defendant company issued to one George R. Moore its policy of insurance against loss by fire on certain property in Oxford Junction, Iowa; that at the time the plaintiff company held a mortgage on the property for \$2,500, and the policy contained a provision as follows: "Loss, if any, is payable to Union Building Association of Clinton, Iowa, as its interest may appear;" that on the 5th day of February, 1889, the building was partially destroyed by fire, resulting in damage to the plaintiff in the sum of \$1,500. The policy also contained a provision as follows: "This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof is actually paid." It is pleaded in the answer, as a defense, that the premium for the policy in question was never paid. Plaintiff, to avoid this defensive plea, replied as follows: "That said policy of insurance set out in plaintiff's petition was obtained by said George R. Moore for the purpose of protecting the interest of plaintiff in said property therein insured, as mortgagee, of which fact defendant had full knowledge at said time; that defendant issued said policy, and sent the same to plaintiff, and recited in said policy that the same was issued 'in consideration of \$42 to them in hand paid by the insured

hereinafter named, the receipt whereof is hereby acknowledged; that at no time, either prior to or subsequent to said loss, has defendant notified plaintiff that said premium was not paid, nor has defendant ever demanded the same of plaintiff, and plaintiff had no knowledge that the same was not paid, or that defendant claimed the same was not paid; and said defendant is now estopped from asserting that said premium is unpaid, as against this plaintiff." The cause was submitted to a jury, that returned a verdict for the plaintiff, and from a judgment thereon the defendant company appealed.

*Marshall & Taggart* and *Shean & McCam* for appellant.  
*Remley & Ercanbrack* for appellee.

GRANGER, J. 1. It is urged by appellee that the assignments of error by appellant are not sufficiently specific to justify us in a consideration of them. With our view of the case, it is only important that we consider the fourth, which is as follows: "The court erred \* \* \* in sustaining plaintiff's objections to the testimony and evidence offered by defendant tending to prove that the premium named in the policy sued on had never been paid by plaintiff, or by any one else, nor any part thereof, and in refusing to permit defendant to prove that no part of said premium had ever been paid; which ruling and proceeding were prejudicial to defendant, and to which ruling and proceeding defendant excepted at the time." It is said this assignment "does not state what questions were asked to which the objections made by plaintiff were sustained, nor to what witnesses the questions were put." In case of an assignment as to the admission or exclusion of evidence, the law does not require that the questions shall be embodied therein. It is not the province of the assignment to contain the part of the record relied upon as showing error, nor is the name of the witness of whom questions are asked material. The error, if any, consists in the exclusion of the evidence offered to establish a material fact in issue. The assignment specifies the fact, and states wherein the court erred, as by refusing evidence proper to sustain such fact. We think the assignment sufficiently specific.

2. We have omitted from the statement of the case issues

not essential to the question which we think it important to consider. The application for the policy was by letter, and concluded as follows: "If you wish to renew at compact rates, you can send renewal to yours truly, and I will remit, and ain, George R. Moore." In pursuance of the application the policy was sent from Rockford, Ill., to George R. Moore, at Oxford Junction, Iowa, with a letter requesting him to remit the amount of the premium due, and the policy was by Moore delivered to the plaintiff company. To sustain the allegation of the answer, that the premium had never been paid, the defendant offered the deposition of one Charles E. Sheldon, who was secretary of the company, in which appears the following question: "State whether or not the premium mentioned in said policy has been paid." There was an objection to the question "as being incompetent and immaterial, for the defendant is estopped from denying the receipt of the premium as stated in the policy." The court sustained the objection, and the ruling is made a ground of complaint to us.

As we view the record and the arguments, we are brought fairly to consider the question whether the defendant company, by issuing the policy as it did, with an acknowledgment of a receipt of the premium, and a statement therein that the "loss, if any, is payable" to the plaintiff company, estops the defendant, as against the plaintiff, from proving non-payment of the premium. It will be seen that the policy was not delivered to Moore upon a credit, but that the parties to the contract of insurance intended it as a cash transaction. Moore agreed to remit the premium on receipt of the policy, and the policy was sent to him with a direction to remit. Until the premium was paid, there was not a complete transaction between the defendant company and Moore; and it is not questioned but that, as to Moore, the policy would be void if the premium was not paid. It is then a question how does the relation of the plaintiff company to the transaction change the rule as to the defendant company's liability? The defendant company sent to Moore the policy, with the words therein, "loss, if any, is payable to Union Building Association of Clinton, Iowa, as its interest may appear." Mr. Flanders, in his work on Fire Insurance (page 441), says: "Where the policy provides that the loss, if any, is payable to

another, to a mortgagee, for example, instead of the assured, it is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence it is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire no loss is sustained by him, and, of course, none is recoverable by his assignee or appointee." In other words, a policy made "payable to A., in case of loss," is an agreement on the part of the insurers that "A." shall recover whatever the person originally insured may be entitled to receive in case of loss; that is, it is a contingent order or assignment of what may become due under the contract, and not an absolute transfer, by virtue of which the assignee acquires the full right of an assignee of a chose in action.

The rule thus stated has the support of many well-considered cases. In *Insurance Co. v. Hulman*, 92 Ill. 154, where this principle in question was involved, the language above is quoted, and the court says: "Making the loss, if any, payable to Hulman & Cox, mortgagees, was not an insurance of their mortgage interest in the property." The supreme court of Massachusetts has repeatedly held to such a rule. In *Franklin Sav. Inst. v. Central M. F. Ins. Co.*, 119 Mass. 240, the plaintiff was a mortgagee; and the policy provided that it was to be payable, in case of loss or damage, to the mortgagees, "as their mortgage claim may appear." The policy was declared void because, in violation of its terms, the property afterward became unoccupied. The court says: "It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagees, but that they can claim only what the party originally insured is entitled to recover under this contract." The case cites *Fogg v. Insurance Co.*, 10 Cush. 337; *Hale v. Insurance Co.*, 6 Gray, 169, and *Loring v. Insurance Co.*, 8 Gray, 28. *Bergson v. Insurance Co.*, 38 Cal. 541, involves the essential facts and the principles that should govern in this case. The non-liability of the company was held because of a failure to pay the premium. The policy had been assigned, and contained a receipt for the premium. After the assignment, the company gave notice to

the assured that, if the premium was not paid by a certain day, the policy would be canceled, which was done. The case, in harmony with other cases, marks a distinction between those involving an assignment of the property insured and an assignment of the policy. In case of a mere assignment of the policy, the case says: "The assignee cannot claim any benefit from the fact that he is a *bona fide* holder without notice." The notice referred to must have been that of the non-payment of the premium for which the policy contained a receipt. Such are the facts upon which the estoppel is claimed in this case. In *Grosvenor v. Insurance Co.*, 17 N. Y. 391, the policy had issued to one McCarty, with the clause: "Loss, if any, payable to Seth Grosvenor, mortgagee." Afterward McCarty, in violation of the terms of the policy, transferred the property so as to defeat the policy as to him. As to Grosvenor, the court says: "The mortgagor must sustain a loss for what the insurers are liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive the payment, that is recoverable from the insurers. In *Carpenter v. Insurance Co.*, 16 Pet. 495, speaking of the assignment of a policy, the court says: "The rights of the assignee under the policy cannot be more extensive than the rights of the assignor." Many other authorities are of like import. Appellee cites some cases as holding a contrary doctrine, but we think, when carefully examined, they do not. We notice two on which we think most reliance is placed. In *Basch v. Insurance Co.*, 35 N. J. Law, 429, the policy was sent to the agent of the company containing a clause that "the policy is to have no effect until the premium shall have been paid." The agent delivered the policy to the assured, with the understanding that the premium, with other premiums, should be paid. The case holds that evidence to show that the premium was not paid was incompetent, and contradicted the receipt in the policy, and the court, by Beasley, C. J., says: "I think, when the assured received this policy, he had a right to presume either that the agent had settled the premiums with the company, or that they, by their receipt, intended to relinquish the clause requiring payment." The record in that case does not show that the company, in sending the policy to the agent, required a pay-

ment, and from the record that court regarded the facts sufficient to justify the assured in assuming that the payment had been made by the agent of the company or waived. In this case, Moore, in receiving the policy acted directly with the company, and he knew that its delivery was conditional upon his promise to remit the premium. In this case, the policy was retained, if the premium was not paid, in plain violation of the understanding of the parties, and there is no ground whatever for assuming either a payment or a waiver, as held in the New Jersey case. In *Insurance Co. v. Gilman* (Ind. Sup.), 13 N. E. Rep'r, 118, the company sought to escape liability because of non-payment of the premium, when the facts were that the assured gave to the agent of the company a credit for which the agent agreed to pay the premiums, and "transmitted the amount of the premium to the company in due course." The case holds that, "for all that appears, the assured was fully justified in presuming that the agent was authorized to make the arrangement disclosed."

While the state of the law on this subject is somewhat confused by a statement in some cases of abstract rules, we have found no case in which the party designated in a policy to which the loss, if any, is made payable, whether he be designated an assignee or an appointee to receive the money (both of such terms are employed in the cases), is entitled to recover where, under the facts, the assured could not. The language under which the payment can be claimed and the authorities lead to the conclusion that the rights of such a party depend on the liability of the company to the assured. Such a liability being established, the payment is to be made to the party designated to receive it. If this premium has not been paid, the case as to Moore is this: "The company, relying on his promise to pay the premium on receipt of the policy, sent it to him. No credit was intended, nor had the company reason to suppose he would wrongfully deliver it to others. Properly speaking, it was not a delivery to Moore, because not intended as such without the payment. The case is not different in principle from what it would be if Moore had been present at the office of the company, and the policy had been handed to him with the intent that the premium would then be paid, and he wrongfully detained it without payment. We believe no case has or will hold that with such facts

the company would be estopped to deny and prove non-payment of the premium. If not estopped as to Moore, it would not be as to the person entitled to receive the loss, if any, in his stead. If not estopped, it must follow that the testimony was admissible to show the fact of non-payment, and that the court erred in excluding it. Believing that this discussion of the case will be a sufficient guide on another trial, other questions need not be considered. The judgment is reversed.\*

#### FIRE INSURANCE—RECENT DECISIONS.

1. *Agents—their powers—waiver by.*—Evidence that a certain person was local agent of an insurance company in certain counties, and had authority to solicit and write applications for insurance, and forward them to the company's general agent, and, on receipt of the policy from the latter, to deliver it and collect the premium, does not show that he had authority to consent to additional insurance, within the meaning of a provision of a policy that if additional insurance was procured without "notice to and consent of" the company in writing, the policy should be void, or to waive such provision. *American Fire Ins. Co. v. Hampton*, 54 Ark. 75; 14 S. W. Rep'r, 1092. To same effect, *Golden v. Northern Assurance Co.*, 46 Minn. 471; 49 N. W. Rep'r, 246.

2. *Application. Application filled up by agent from his own knowledge—effect of false statements.*—Where a local agent of a fire insurance company furnishes a blank application to a party seeking insurance, and the agent himself, who has full and complete knowledge of all the facts, fills up the blanks and informs the applicant that the same is done correctly, and the applicant believes him and signs the application, and afterward a policy is issued thereon, and afterward a fire occurs, destroying all the insured property, held, that the company cannot then claim that the insurance policy is void because of inaccurate or incomplete statements in the application. *Phoenix Ins. Co. v. Weeks*, 45 Kans. 751; 26 Pac. Rep'r, 410.

*Oral application by insured—false statement to company by agent—effect.*—Where an applicant for insurance signs no application, but tells the agent that there is a mortgage on the premises, and the latter, in his daily report, on which the policy is issued, states that there is no mortgage, the agent's knowledge is imputable to the company, and the policy is not avoided by the misrepresentation. *Gristock v. Royal Ins. Co.*, 87 Mich. 428; 49 N. W. Rep'r, 634.

*Parol evidence to vary written application.*—Where an application for insurance has been reduced to writing, and the applicant has had an opportunity to read the same, but signs it without reading it, and there is no fraud practiced, and the applicant afterward receives the policy of insurance based upon such application, and retains it for several months without objection, he cannot, in an action brought upon a note given for the premium on such policy, vary or contradict the statements in the written application by parol evidence. *Walker v. State Ins. Co.*, 46 Kans. 312; 26 Pac. Rep'r, 718.

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\*Reported in 49 N. E. Rep'r, 1032.

*Informal application by letter — whether a warranty.*— Though the letter in which application for insurance was made stated that a certain amount of insurance would be maintained, still there being no reference in the policy to an application, and it being provided by the policy that if an application was referred to therein it should be a part of the contract and a warranty by the assured, it will be held that the policy was not issued on the condition that the amount of insurance named should be maintained. *Citizens' Ins. Co. v. Hoffman*, 128 Ind. 370; 27 N. E. Rep'r, 745.

*Insured not bound to make disclosures except in answer to questions propounded.*—Where the policy contains many questions as to facts deemed by the company material to the risk, the insured is bound to disclose only such matters as may be inquired about by the company. *Wytheville Ins., etc., Co. v. Stultz*, 87 Va. 629; 13 S. E. Rep'r, 77.

*Disclosure as to matters not within knowledge of insured.*—An instruction that the insured was bound to disclose every material fact which at the time of the issuance of the policy would have influenced the company in issuing or refusing it, or which would have induced the demand of a higher rate, is properly refused, as the insured must have knowledge of the existence of the fact or of its materiality before the policy can be avoided for his failure to disclose it. *Id.*

*In absence of application, conditions of policy binding.*—As a general rule, where there is no application for insurance, the insured is bound by the conditions found in the policy which he has accepted and retained without objection. *McFarland v. St. Paul F. & M. Ins. Co.*, 46 Minn. 519; 49 N. W. Rep'r, 253.

**3. Arbitration. Waiver of provision for arbitration.**—Though a fire policy stipulates that in case of a failure to agree upon the amount of damage it shall be ascertained by appraisers, and that until the required proofs are produced and appraisals are permitted the loss shall not be payable, the assured having offered proofs of loss that are rejected by the company, which does not demand an appraisal nor dispute the amount of damage as shown in the proofs, may sue for the loss without himself first offering to have the property appraised, or requesting the appointment of appraisers. *Randall v. American Fire Ins. Co.*, 10 Mon. 340; 25 Pac. Rep'r, 953. To the same effect, *Randall v. Phoenix Ins. Co.*, 10 Mon. 362; 25 Pac. Rep'r, 960; *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 835; 26 N. E. Rep'r, 877.

The fact that adjusters, without authority from an insurance company, in making up proofs of loss, agree with the assured on a certain amount, is not a waiver by the company of a condition in the policy requiring the amount of loss to be ascertained by arbitration before suit. Where, however, such amount is included by the adjusters in the proofs of loss, and is sent to and retained by the company without objection, it thereby consents to the amount and waives the right to have the loss arbitrated. *Everett v. London & L. Ins. Co.*, 142 Penn. St. 833; 31 Atl. Rep'r, 819.

**4. Conditions of forfeiture—their construction and application. Manufacturing establishment—ceasing to operate.**—A building used as a shoe factory, the machinery and fixtures, and the stock of boots and shoes therein, were separately insured in different companies, under policies containing no refer-



ence to each other. In accordance with the "standard form" prescribed by Public Statutes of Massachusetts, chapter 119, section 139, each policy was conditioned to be void, "if the property insured was a manufacturing establishment, if such establishment ceased operation for more than thirty days," without written permission. Held, that a stoppage of machinery for four months, and discharge of employes, forfeited the policies on the building and machinery, although the insurance company knew it was usual thus to stop business in the dull season. *Stone v. Howard Ins. Co.*, 153 Mass. 475; 27 N. E. Rep'r, 6. The policy on the stock of boots and shoes was not forfeited, since the property insured was not "a manufacturing establishment," or a part of one. *Id.*

*Use of gasoline—waiver of condition.*—A condition in a policy provided that if gasoline was used upon the premises the policy should be void. It was issued without inquiry, and without an application or any representations on plaintiff's part. Reasonable investigation would have disclosed that plaintiff was then using a gasoline stove, and the fire which subsequently destroyed the house was caused by an explosion of this stove. Held, that plaintiff could not recover on the policy. *McFarland v. St. Paul F. & M. Ins. Co.*, 46 Minn. 519; 49 N. W. Rep'r, 253.

*Storing hazardous articles—keeping gasoline and kerosene for sale.*—Though gasoline and coal-oil may be articles of the class known as "extra hazardous," the keeping of them in reasonable quantities in a grocery store for the purpose of selling at retail, unless specifically prohibited in the policy, will not avoid a contract of fire insurance, notwithstanding provisions in the policy that it shall be void if the premises are occupied in such a way as to increase the risk, or if used for the purpose of "storing" any article denominated "hazardous" or "extra hazardous." *Renshaw v. Missouri State Mut. F. & M. Ins. Co.*, 103 Mo. 595.

*Vacancy for thirty days—computation of time.*—Plaintiff filed an application for insurance with defendant's agent, and some time after, receiving notice that his policy was ready, called for it, and paid the premium. There was no agreement that the policy should take effect before payment of the premium. Held, that the time between the application and payment of the premium cannot be considered in determining whether the premises were vacant for thirty days, contrary to a provision of the policy. *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335; 26 N. E. Rep'r, 877.

*Change in the exposure—temporary location of steam engine.*—The use by the assured of a steam engine to operate a corn-sheller, near an insured corn-crib, is within the meaning of a clause in the policy that it shall be void "if there be any change in the exposure, by the erection or occupation of adjacent buildings or by any means whatever in the control or knowledge of the assured." *Davis v. Western Home Ins. Co.*, 81 Iowa, 496; 46 N. W. Rep'r, 1073.

*Increase of risk—erection of addition by tenant.*—When a tenant, without the knowledge or consent of the assured, erects an addition to the building insured, such change does not avoid the policy, although it contains a provision that it shall be void and of no effect if the risk be increased by any means within the control or knowledge of the assured. *Nebraska & I. Ins. Co. v. Christiansen*, 29 Neb. 572; 45 N. W. Rep'r, 924.

*Manner of occupation—use of premises for purposes of prostitution.*—The

building insured was described in the policy as being occupied as a saloon. It was so occupied by a tenant at the time of the fire, as well as when the policy was issued. The fact that at the time of the loss the building was also used by the tenant for the purpose of prostitution does not invalidate the policy, when it appears that the premises were used for such illegal purpose without the knowledge or consent of the owner, and that the loss did not occur from such use. *Id.*

*Other insurance—knowledge of agent.*—Taking out concurrent insurance beyond the amount allowed by a policy does not avoid the policy, when such concurrent insurance is taken out through the agent of the company that issued the policy. *Hagan v. Merchants & Bankers' Ins. Co.*, 81 Iowa, 321; 46 N. W. Rep'r, 1114.

*Misrepresentation as to incumbrances on the property.*—A fire insurance policy, conditioned to be void for misrepresentations in the application, is avoided by a gross under-statement of the amount of incumbrances. *O'Brien v. Home Ins. Co.*, 79 Wis. 399; 48 N. W. Rep'r, 714.

5. *Construction of policy. Permission to use for "any mercantile purpose."*—Permission in a fire insurance policy to use the building for "any mercantile purpose," does not authorize its use as a restaurant. *Garretson v. Merchants & Bankers' Ins. Co.*, 81 Iowa, 737; 45 N. W. Rep'r, 1047.

*Loss by explosion—liability.*—Where the indemnity provided for by a fire policy is against loss or damage by fire, without making any exception, a damage from an explosion will be covered by the policy, whether it result from an accidental fire gradually coming in contact with coal-oil or gasoline, or from an innocent fire, such as a gas-jet, purposely left burning, igniting the inflammable gas, mixed with atmosphere, which had escaped and filled the room. *Renshaw v. Missouri State Mut. F. & M. Ins. Co.*, 103 Mo. 595; 15 S. W. Rep'r, 945.

*Extent of risk.*—A policy of insurance for \$1,500 on twenty-one different pieces of property gave an itemized statement of the pieces, with a sum of money following each item, amounting in all to \$90,000, and declared that the company only insured one-sixtieth part of each of said sums, and that it was only liable for such proportion of the loss as the amount insured thereby bore to the whole amount of insurance. The property was damaged by fire to the amount of \$51,000, the total insurance being \$90,000. Held, that the company issuing said policy was liable for one-fortieth of the loss. *Indiana Ins. Co. v. Hoffman*, 128 Ind. 250; 27 N. E. Rep'r, 561; *Citizens' Ins. Co. v. Hoffman*, 128 Ind. 370; 27 N. E. Rep'r, 745.

6. *Contract for insurance—consummation of contract.*—The retention of a policy by the insured with knowledge of the fact that certain articles of property, agreed to be covered by the policy, have been omitted, will render the insured liable upon his premium notes. *Pierce v. Home Ins. Co.*, 45 Kans. 576; 26 Pac. Rep'r, 5.

7. *Insurable interest. Purchaser under a parol agreement.*—A tenant in common who has purchased the interest of his co-tenant and paid the consideration under an oral agreement, though he has not received a deed, has an insurable interest in the entire property. *Wainer v. Milford Mut. Fire Ins. Co.*, 158 Mass. 335; 26 N. W. Rep'r, 877.

*Husband's right of homestead in wife's property.*—Where a husband conveys

property to his wife, holding an insurance policy on the buildings, which provides that no loss shall be paid unless the assured or his assignee shall at the time of the fire have or hold a *bona fide* insurable interest in the property burned, either by ownership or as mortgagee, he cannot recover for a loss on the ground that the buildings were upon the homestead, and he thereby retained an insurable interest. *Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co.*, 87 Mich. 349; 49 N. W. Rep'r, 595.

8. *Interest.* Where by its terms a policy is payable sixty days after proof of loss, the insured, who has delivered proofs of loss that are rejected by the company because they contain a clause stating that the estimate of value was made by persons agreed upon, can recover interest from the date of the delivery of the proofs. *Randall v. Am. Fire Ins. Co.*, 10 Mon. 340; 25 Pac. Rep'r, 958.

9. *Limitation clause. Original summons quashed—alias summons after time limited.*—An action on a policy of insurance conditioned that suit thereon shall be brought within a year is brought in time if the original summons is issued within a year, though it is afterward set aside and an *alias* summons issued after expiration of the year. *Everett v. Niagara Ins. Co.*, 142 Penn. St. 329; 21 Atl. Rep'r, 817.

*Waiver of, by company—acts held insufficient*—The acts of adjusters, without authority from an insurance company, and letters from the company to its own agent, denying liability, but informing him that to avoid litigation it would settle under certain conditions, are not sufficient evidence to warrant submission to the jury of the question of waiver by the company of a condition of the policy limiting the time within which suit should be brought. *Everett v. London & L. Ins. Co.*, 142 Penn. St. 332; 21 Atl. Rep'r, 819.

*Acts of waiver must be done within period limited.*—To constitute a waiver by an insurance company of a condition in a policy limiting the time within which suit shall be brought, the act relied on must have been done during the period of limitation. *Id.*

9. *Proofs of loss. Waiver of formal proofs.*—In an action on an insurance policy, it appeared that an adjuster of the company spent several days with the assured's son and agent in making a list of the personalty destroyed, and the two employed a builder to estimate the value of certain buildings, and referred to an arbitrator the value of a dwelling on which they could not agree. Held, that if the adjuster's conduct would induce an honest belief that the proofs then being made were all the company required, and the assured did so believe, the jury might find that formal proofs were waived. *Gristock v. Royal Ins. Co.*, 87 Mich. 428; 49 N. W. Rep'r, 634.

*Denial of liability—effect as a waiver of proofs.*—Where a fire insurance policy was issued by an insurance company, and afterward the insured property was destroyed by fire, and the company then denied all liability on the ground that the policy was void, held, that by this denial the company in effect waived all its rights under certain stipulations in the policy requiring proofs of loss to be made, and giving the company sixty days thereafter within which to pay the loss; and a suit brought on the policy within less than the sixty days is not prematurely brought. *Phoenix Ins. Co. v. Weeks*, 45 Kan. 751; 26 Pac. Rep'r, 410.

10. *Suit upon policy—parties—pleadings—evidence—defenses. Complaint need not negative grounds of forfeiture.*—Although the policy set forth in the complaint contains a provision that it shall be void if the premises become vacant, it is unnecessary to allege that they did not become vacant, as this is matter of defense only. *Butternut Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.*, 78 Wis. 202; 47 N. W. Rep'r, 366. To same effect, *Benedix v. German Ins. Co.*, 78 Wis. 77; 47 N. W. Rep'r, 176.

*Suit by mortgagor when loss payable to mortgagee.*—A mortgagor's right to recover in his own name upon an insurance policy, in which the loss, if any, is made payable to the mortgagee as his interest may appear, depends upon his having paid the debt, or having, in some other proper manner, satisfied and discharged the incumbrance; or, possibly, he might recover by alleging in his complaint, and showing upon the trial, that the mortgagee had consented to and authorized a recovery by him. *Graves v. Am. Live-Stock Ins. Co.*, 46 Minn. 130; 48 N. W. Rep'r, 684.

11. *Waiver of conditions. Provision as to prepayment of premium.*—A clause in a policy of fire insurance, providing that "the company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof shall be actually paid," may be waived by the company. *Nebraska & I. Ins. Co. v. Christiensen*, 29 Neb. 572; 45 N. W. Rep'r, 924.

*Issuing policy with knowledge of existing incumbrances.*—Where a stipulation in a policy provides that the company shall not be liable "if the property \* \* \* is or shall become mortgaged without the assured's written notice to, and without the written permission of, this company indorsed on the policy," and the assured signed no written application, but told the agent that there was a mortgage on the premises, delivery of the policy to the assured, without an indorsement of permission, and without calling his attention to the conditions respecting the incumbrance, operates as a waiver thereof by the company. *Gristock v. Royal Ins. Co.*, 87 Mich. 428; 49 N. W. Rep'r, 634.

12. *Waiver of forfeiture. Acts of agent requiring proof of loss, etc.* The forfeiture created by the breach of a condition in an insurance policy, prohibiting the use of gasoline in the building, is not waived because the company's agent, whose authority was limited to soliciting insurance, delivering policies and receiving the premiums, consented that the building might be used as a restaurant, which included the use of a gasoline stove, or because the agent required proof of loss at the expense of the insured without claiming the forfeiture. *Garretson v. Merchants & Bankers' Ins. Co.*, 81 Iowa, 727; 45 N. W. Rep'r, 1047.

*Silence of company having knowledge of cause of forfeiture—other insurance.*—Where the policy provides that the policy, unless otherwise provided by agreement indorsed thereon, shall be void if the insured shall thereafter procure any other insurance on the property, mere notice or knowledge on part of the insurance company that the insured has subsequently placed other insurance on it, or intends to do so, is not of itself a waiver or consent on part of the company, at least where the notice is not communicated in a manner implying a request for permission to do so, or so as to require the company to act upon it by either consenting or refusing to consent. *Goldin v. Northern Ass. Co.*, 46 Minn. 471; 49 N. W. Rep'r, 246.

## HAUGEN V. ALBINA LIGHT AND WATER CO.

(Supreme Court of Oregon, Dec. 14, 1861.)

1. WATER COMPANIES. DUTY TO SUPPLY WATER FOR PRIVATE CONSUMPTION. A company incorporated for the purpose of supplying a city and its inhabitants with water, and by ordinance granted the privilege of laying its pipes through the streets for the purpose of conducting water, with no conditions imposed except that its pipes shall be laid in a certain manner, and that it should in no case charge more than a certain amount for water, must furnish water to any person on a street along which it has a pipe, though that pipe was laid for certain persons, who paid therefor on the agreement that, if it was used for supplying water to any one else, it should be paid for by the company.

2. MANDAMUS THE PROPER REMEDY. *Mandamus* is the proper method of compelling the company to furnish water.

**A** PPEAL from circuit court, Multnomah county, E. D. Shattuck, judge. Application of Iver S. Haugen for writ of *mandamus* to the Albina Light and Water Company. A demurrer was sustained to the answer, and a judgment given making the writ peremptory, from which defendant appeals. Affirmed.

The other facts fully appear in the following statement by Lord, J.:

This is an action for a writ of *mandamus* to require the defendant to supply the plaintiff with water by tapping a certain water-main on Tillamook street, and allowing him to connect therewith a service-pipe, etc. The facts alleged, in substance, are these: That the defendant is a corporation, the business of which, among other things, is to furnish the city of Albina, and the inhabitants thereof, with water. That it is operating under a franchise granted to said company by the council of the city of Albina by virtue of an ordinance, as follows: "An ordinance granting the right of way through the streets for laying pipes for the purpose of conveying water through the city. The city of Albina does ordain as follows: Section 1. That the Albina Water Company, its successors and assigns, be, and are hereby, granted the right and privilege of laying pipes through the streets of the city of Albina, for the purpose of conducting water through the city. Section 2. That the ditches for laying pipes shall be sunk two feet, and the pipes for

conducting the water shall be under the surface or level of the established grade eighteen to twenty inches on all improved streets, and no pipe shall be laid so as to interfere with the construction of sewers; provided, that nothing in this ordinance shall be construed so as to grant any exclusive right or privilege of conducting water into the city: provided, further, that said water company shall in no case charge more than \$1 per month for the first faucet, and fifty cents for each additional faucet, in the same building, for family use, or at a private dwelling-house," etc. That the purpose and object of granting to said company the right to lay water-mains in the streets of said city was that the citizens of said city might be furnished with a supply of pure and wholesome water. That by virtue of the authority conferred by said ordinance, the defendant laid down a four-inch water-main in and through Tillamook street, in the then city of Albina, from the east line of the original town-site of the city of Albina to the west line of Twenty-fourth street, in Irvington, and connected the said main with the main on Margaretta avenue, in said city, and for nearly a year past has been pumping water, and conducting it through said main on Tillamook street, to supply the citizens of Irvington residing east of Fourteenth street. That the defendant utterly refuses to allow any one residing on Tillamook street, between the east line of the original town-site of Albina and Fourteenth street, in Irvington, to tap said main, and refuses to supply them with water therefrom. That the plaintiff resided on Tillamook street between the points above named, and is the owner of lot 2, block 126, of Irvington. That said lot abuts on said Tillamook street, and the plaintiff is constructing thereon a dwelling, and is desirous of securing a supply of water from the water-mains of said street, that being the only source of water supply for said premises. That the plaintiff has repeatedly requested the defendant to supply him with water from said main, but has always been refused. That on the 11th day of July the plaintiff tendered said defendant \$2.50, the regular fee charged by the defendant for tapping a water-main with a service-pipe, and demanded from the defendant to be connected with said water-main in Tillamook street, and to be supplied therefrom with water; and that said defendant refused to accept said tender, and refused to connect the plaintiff's premises with said main, and refused to supply

him with water therefrom. That said refusal is willful, and is done for the avowed purpose of debarring the residents on said Tillamook street, between the original town-site of Albina and Fourteenth street, and particularly the plaintiff, from the use of water from said main. That the plaintiff is without any legal remedy in the premises except the writ of *mandamus*, etc. The defendant denies that, under the authority conferred by said ordinance, it laid down a four-inch or any water-main in or through Tillamook street, in said city, as alleged; or connected the said alleged main with the main on Margareta avenue, in said city; or for nearly a year past, or for any time, has been pumping water through said alleged main; but the defendant alleges the fact to be that Ellis G. Hughes and C. H. Prescott are owners of the tract of land known as "Irvington" and "John Irving's First Addition," east of Fourteenth street, in Albina; and that in pursuance of an agreement entered into between the said Hughes and Prescott, for the purpose of supplying water to the property in Irvington, and said John Irving's First Addition, the defendant laid down in said Tillamook street a supply-pipe for said Hughes and Prescott, for which pipe the said Hughes and Prescott paid, for the sole purpose of supplying said lands with water. That said pipe is owned by said Hughes and Prescott, and is under their absolute control. That the defendant has no right to tap the same, except with the consent of Hughes and Prescott, without paying the said Hughes and Prescott the sum of \$3,600, the cost of laying the same. That the business along the line will not justify the defendant in incurring the expense of purchasing said service-pipe and converting it into a main. That defendant has repeatedly applied to said Hughes and Prescott for leave to tap said service-pipe, without having to pay the price charged therefor, but they wholly refuse to give consent for the defendant to do so. Denies that the defendant's refusal to tap said main or refusal to supply the plaintiff with water is willful, or without lawful cause, or that the same is done with the avowed or any purpose of depriving the residents of Tillamook street, or the plaintiff, from the use of water from the alleged main, but alleges that the reason for not supplying the plaintiff with water from said service-pipe of said Hughes and Prescott is that it cannot do so without becoming liable to pay said Hughes and Prescott for said pipe the sum of \$3,600, which

sum the defendant is not now prepared or able to pay, and for the further reason that the water which would be used along said street will not justify the expenditure, etc. The plaintiff demurred to the new matter stated in the answer, and when the cause was heard the court sustained the demurrer, and gave judgment making the writ peremptory, from which this appeal is taken.

*Dolph, Bellinger, Mallory & Simon* for appellant. *J. C. Moreland* for respondent.

LORD J. (after stating the facts). From this statement of the case, as presented by the pleadings, the court below held that, when the defendant entered upon and laid down its water-mains in the street, in pursuance of the privilege granted by the ordinance, it became bound to supply every abutter upon the street with water. The contention for the defendant is that the ordinance does not impose the duty upon it to furnish water, but only, if it shall furnish water, that the charge therefor shall not exceed a certain sum therein specified; that the grant is to lay pipes through the streets for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers; but that it contains no provision requiring it to supply the city or its inhabitants with water hence the ordinance imposes no duty upon the company to furnish water to any one. In whatever form the argument is presented, it rests essentially upon this contention. While admitting that it is a corporation organized to supply the city and its inhabitants with water, and that the city, by its ordinance, granted it the right to lay water-mains through its streets for the purpose of carrying into effect the objects of its incorporation, it insists that the ordinance is the measure of the rights conferred and the obligation imposed, which by its terms, only grants "the right and privilege of laying pipes through the streets of the city of Albina for the purpose of conducting water through the city," under the conditions imposed, without "a word in the language of the grant from which it could be inferred that the company is placed under any obligation whatever to supply any inhabitant of the city with water." Counsel say: "If the ordinance had imposed upon the company the duty of supplying the inhabitants



with water as a part of the conditions of the grant, such conclusion might be supported; but where no such duty is said and nothing is said except that, when the company furnishes water, it shall charge no more than a certain rate per inch, it fails to see the soundness of the reasoning which makes it the duty of the company to furnish water." It is thus seen that the absence of any express provision in the ordinance, imposing the duty upon the defendant to supply water, upon the argument and the case for the defendant is predicated. That duty is not to be given to the fact that the defendant company was incorporated under the law, to furnish water to the city and its inhabitants, and the implied obligation which the defendant assumed in accepting the grant or franchise under the ordinance, is overlooked. The defendant is treated as a private corporation, the business of which is private, and not of a public nature, to meet a public necessity; and, as a consequence, that it should not be subjected to duties or obligations that are not binding upon other private corporations. In support of this view, the authority cited and relied upon by the defendant is *Gas-Light Co. v. Brady*, 27 N. J. Law, 245.

In that case the court was urged to assert the doctrine that gas companies, like common carriers and inn-keepers, were to accommodate the public, but refused on the ground that the lack of precedents upon the subject could only be based upon a strong presumption that there was no principle of law upon which such a view could be supported. The court says: "The company may organize; may make and sell gas or not, at the discretion of the directors; and I see no more reason to hold that the duty of the company is meant to be imperative than to hold that other companies incorporated to carry on manufactories, or to do any other business, are bound to serve the public any further than they find it in their interest to do so. It was earnestly insisted on the other side that the community have a great interest in the use of gas, and that companies set up to furnish it ought to be treated as inn-keepers and common carriers, and that, if no precedent was found for such a decision, this court ought to make one. But there is no authority for so holding in England or America. Gas companies have been so long incorporated for supplying gas to the inhabitants of numerous towns and cities,

strong presumption that there is no principle of law upon which it can be supported." But this case and its reasoning was directly disapproved and overruled in the subsequent case of *Olmsted v. Proprietors*, 47 N. J. Law, 333, in which the court says: "In that case [*Paterson Gas-Light Co. v. Brady*] Mr. Justice Elmer declared that the company was under no legal obligation to supply gas to all persons having buildings on the line of their pipes, upon tender of reasonable compensation. He rested this view on the absence of any express provision in the charter imposing such duty upon the company. This decision fails, however, to give due effect to the purpose of the legislature in creating the company, and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses, empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and, of course, the grant of eminent domain for such private purpose would be void. In this respect, in my judgment, the conclusion in the *Paterson Case* was erroneous, and in conflict with the views expressed in the *Tide-Water Case*, 18 N. J. Eq. 518, and in *National Docks Ry. Co. v. Central R. Co.*, 32 N. J. Eq. 755."

This view is certainly more in accord with recent decisions establishing the doctrine that it is mandatory upon corporations of this sort to supply one and all without distinction. The defendant by incorporating, under the statute, for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise belonging to the public, and not enjoyed of common right, for the accomplishment of public objects, and the promotion of the public convenience and comfort. Its business was not of a private, but of a public nature, and designed, under the conditions of the grant, as well for the benefit of the public as the company. "Such a business," says Mr. Justice Harlan, "is not like that of an ordinary corporation, engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas-lights. The former articles may be supplied by individual effort, and with their supply the government

has no such concern that it can grant an exclusive right to engage in their manufacture and sale; but as the distribution of gas in thickly populated districts is, for the reason stated in other cases, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question." *Louisville Gas Co. v. Citizens' Gas-Light Co.*, 115 U. S. 683; 6 Sup. Ct. Rep'r, 265. And, in another case the same eminent judge said: "The manufacture of gas, and its distribution for public and private use, by means of pipes laid down under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity, for which the state may make provision." *New Orleans Gas-Light Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650; 6 Sup. Ct. Rep'r, 252. It must then be conceded that the defendant is engaged in a business of a public, and not of a private nature, like that of ordinary corporations, engaged in the manufacture of articles for sale; and that the right to dig up the streets, and place therein pipes or mains for the purpose of conducting water for the supply of the city and its inhabitants, according to the express purpose of its incorporation, and the business in which it is engaged, is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority. In such case, how can the defendant refuse to supply water to one and all without distinction, whose property abuts upon the street in which their pipes are laid, upon the tender of the proper compensation? The defendant company was organized to supply water to the city and its inhabitants, and the franchise granted by the city authorities was the means necessary to enable it to effect that purpose.

Without the franchise, the object for which the company was incorporated would fail and come to naught. It could not carry on the business of supplying the city and its inhabitants with water without authority from the city to dig its streets and lay pipe therein for conducting or distributing water for public and

private use. It was not organized to lay pipes, but to supply water, and the grant was to enable it to do it, and thereby effect the public purpose contemplated. When the defendant incorporated to carry on such a business, we may reasonably assume that it was with the expectation of receiving a franchise from the city, which, when conferred, it would undertake to carry on according to the purposes for which it was organized. By its acceptance of the grant, under the terms of its incorporation, it assumed the obligation of supplying the city and its inhabitants with water along the line of its mains. It could not dig up the streets and lay pipes therein for conducting water except to furnish the city and its inhabitants with water. That was the purpose for which it became a corporation, and the grant of the city was to enable it to carry it into effect. And "if the supplying of a city or town with water," as Van Syckel, J., said, "is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head." *Olmsted v. Proprietors*, supra.

As the defendant could not carry on the business of supplying water without the franchise, the city must have intended in granting such franchise to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant, in accepting the benefits of the grant, must have assumed the performance of such duty. In a word, the acceptance of a franchise, under such conditions, carries with it the corresponding duty of supplying the public with the commodity which the corporation was organized to supply to all persons without discrimination. "It may be laid down as a general rule," says Mr. Morawetz, "that whenever the aid of the government is granted to a private company, in the form of a monopoly or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. \* \*

\* The same rule applies to companies invested with special privileges, at the expense of the public, for the purpose of supplying cities with water." 2 Mor. Priv. Corp., § 1129. The books are replete with illustrations of this principle as applied to water companies, gas companies, telephone companies and others

in the performance of public duties. In *Lumbard v. Stearns*, 4 Cush. 61, it was held that if an aqueduct corporation, established for the purpose of supplying a village with pure water, should undertake, capriciously and oppressively, to enhance the value of certain estates by furnishing them with a supply of water, and depreciate that of others by refusing it to them, such conduct would be a plain abuse of their franchise.

Shaw C. J., said: "We can perceive no ground on which to sustain the argument that this act does not declare a public use. The supply of a large number of inhabitants with pure water is a public purpose. But it is urged that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots, and refusing to supply others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it." This case is cited with approval in *Lowell v. Boston*, 111 Mass. 464, and in *Olmsted v. Proprietors*, *supra*, in which *Gas-Light Co. v. Brady*, 27 N. J. Law, 245, is distinctly disapproved and overruled. In *Shepard v. Gas-Light Co.*, 6 Wis. 539, the company had the exclusive right of supplying the city of Milwaukee with gas. The plaintiff, a merchant doing business on a street containing one of the defendant's mains, fitted up his establishment with the necessary pipes and fixtures for lighting the same with gas. He applied to the company for a supply, tendering at the same time \$5 in advance payment therefor. He was required, as a condition precedent, to sign the printed rules and regulations of the company. He declined to do so. The company refused to waive the point, and suit was brought to recover damages suffered by the plaintiff because of such refusal. After discussing the question at great length, the court held that the company was bound to furnish gas to the citizen who has made all necessary preparation to receive the same, upon compliance by the citizen with such reasonable terms as the company may rightfully impose. But the court declares that the fact of an exclusive right to manufacture and sell gas in the city would imply an obligation on the part of the company to furnish the city and citizens with

a reasonable supply upon reasonable terms ; that when the nature and objects of the corporation are considered, namely, the exclusive right to manufacture and sell gas for the purpose of lighting the city and dwellings and business places of its inhabitants, how can it be urged that this is a mere private corporation, for the manufacture and sale of a commercial commodity ? In *Williams v. Gas Co.*, 52 Mich. 499; 18 N. W. Rep'r, 236, the action was for damages for the failure of the defendant to furnish the plaintiff with gas, as plaintiff claimed was the defendant's duty. The court says: "The questions presented and argued before the judge of the superior court by counsel for the defendant were — *First*, the plaintiff could not recover, for the reason that the defendant was under no legal obligation or duty to supply any citizen of Detroit with gas. The court below disagreed with the defendant's counsel upon this point. I agree with the judge of the superior court that it is the duty of the defendant, upon reasonable conditions, to supply the citizens of Detroit who have their residence at and places of business east of the center of Woodward avenue with gas, wherever the defendant has connected its mains and service-pipes with the pipes and fixtures used at such residences and places of business, and the owners or occupants shall desire the same. "The defendant is a corporation in the enjoyment of certain rights and privileges under the statutes of the state and charter and by-laws of the city, and derived therefrom. These rights and privileges were granted, that the corresponding duties and benefits might inure to the citizens when the rights and privileges conferred should be exercised. The benefits are the compensation for the rights conferred and privileges granted, and are more in the nature of convenience than necessity; and the duty of this corporation imposed cannot, therefore, be likened to that of an inn-keeper or common carrier, but more nearly approximates that of the telegraph, telephone or mill-owner." *Price v. Riverside, etc., Co.*, 56 Cal. 431; *McCrary v. Beaudry*, 67 Cal. 120; 7 Pac. Rep'r, 264; *Lloyd v. Gas-Light Co.*, 1 Mackay, 331; *People v. Gas-Light Co.*, 45 Barb. 136; *Gas-Light Co. v. Colliday*, 25 Md. 1; *Gas-Light, etc., Co. v. Paulding*, 12 Rob. (La.) 378.

The same principle applies to telephone companies, which are regarded so far as common carriers in their relation to the public that they must serve all members thereof alike in the trans-

mission of messages. In *Telephone Co. v. State*, 118 Ind. 206; 19 N. E. Rep'r, 604, the court says: "While it may not supply and take the place of the telegraph in many instances and for many purposes, yet in others it far surpasses it, and is and can be put to many uses for which the telegraph is unfitted, and by persons wholly unable to operate and use the telegraph. It has been held universally by the courts, considering its use and purpose, to be an instrument of commerce, and a common carrier of news, the same as the telegraph; and, by reason of being a common carrier, it is subject to proper obligations, and to conduct its business in a manner conducive to the public benefit, and to be controlled by law. It is by reason of the fact that business men can have them in their offices and residences, and without leaving their homes or their places of business, call up another at a great distance, with whom they have important business, and converse without loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce. It being an instrument of commerce, and persons or corporations engaged in the general telephone business being common carriers of news, what are the rights of the public, independent of the statute, as regards discrimination? Any person or corporation engaged in the telephone business, operating telephone lines, furnishing telephonic connections, facilities and services to business houses, persons and companies, and discriminating against any person or company, can be compelled by mandate, on the petition of such person or company discriminated against, to furnish to the petitioner a like service as furnished to others." *State v. Telephone Co.*, 17 Neb. 126; 22 N. W. Rep'r, 237; *Commercial Union Tel. Co. v. New England Tel. & Tel. Co.*, 61 Vt. 241; 17 Atl. Rep'r, 1071; *State v. Telephone Co.*, 36 Ohio St. 296. A corporation undertaking, by its acceptance of a public franchise, to perform a certain service, can be by *mandamus* compelled to perform that service. *People v. Railroad*, 104 N. Y. 58; 9 N. E. Rep'r, 856; *Vincent v. Railroad Co.*, 49 Ill. 33; *Trust Co. v. Henning*, 17 Am. Law Reg. (N. S.) 266.

The pipe which was laid by the defendant in Tillamook street was laid under the franchise granted by the city, and it had no authority to lay any other kind of pipe or main than prescribed by the ordinance, or for any other purpose than conducting

water to supply the city and its inhabitants, without discrimination, to all persons having buildings or lots on the lines of their pipe, upon tender of the proper compensation. There is no claim that Hughes and Prescott had any right to dig up the street, and to lay such pipe. It could only be done by the defendant, so far as disclosed by this record, under the grant, in the mode prescribed, and for the purposes already stated. It is true it is alleged, in effect, that the pipe was laid along the street and in front of the property of plaintiff for the exclusive benefit of Hughes and Prescott's property, and for the sole purpose of supplying their lands with water. The street in front of the plaintiff's property was subjected to this public use for the special benefit of aiding in the sale of their property. Their object was to induce purchasers to buy land from them for homes in places of others whose property along the street abutted on the main. To favor them, the defendant, by virtue of the franchise granted, laid the pipe, but refused to supply the plaintiff with water from it upon the tender of the amount usually charged for such service. As neither Hughes nor Prescott are parties to this record, what rights or contractual relations they may bear to the defendant we neither know nor decide. We attach no significance to words "supply-pipe" used in the answer. The pipe was laid along the street and in front of the lot of the plaintiff under the franchise granted by the city, and by the terms of its incorporation, to supply water to the city and its inhabitants. This being a public purpose, and the business of a public nature, the defendant must serve all alike, and for any discrimination *mandamus* is the appropriate remedy. We discover no error, and the judgment must be affirmed.\*

**Water companies—duty to serve all applicants.**—In support of the principal case see *Spring Valley Water-Works v. Schottler*, 110 U. S. 847; *Lumbard v. Stearns*, 4 Cush. 60; *People v. Manhattan Gas Co.*, 45 Barb. 186; *City of St. Louis v. St. Louis Gas-Light Co.*, 70 Mo. 69; *State v. Columbus Gas-Light, etc., Co.*, 84 Ohio St. 572.

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\* Reported in 36 Pac. Rep'r, 344.



## REINING ET AL. V. NEW YORK, L. &amp; W. R. Co. STRASSER ET AL. V. SAME. JEAUME ET AL. V. SAME.

(Court of Appeals of New York, Oct. 6, 1891.)

1. RAILROADS IN STREETS. EMBANKMENTS AND STRUCTURES FOR RAILROAD PURPOSES. RIGHTS OF ABUTTING OWNERS. The legislature may authorize railroad tracks, either for steam or horse railroads, to be laid on the ordinary grade of streets the fee of which is in the state or municipality, without making compensation to abutting owners for consequential injuries to their property; but it cannot legally authorize structures for railroad purposes to be erected therein for the use and convenience of railroads which practically exclude the abutting owners from the part of the street so occupied, without compensating them for the injuries suffered; and to entitle the lot-owners to a legal remedy, actual physical exclusion of them from the use of that part of the street occupied by such a structure is not necessary. It is enough that such part of the street is substantially closed against them for ordinary street uses.

2. STATUTE AUTHORIZING CITY TO PERMIT RAILROADS IN STREETS. IMPLIED CONDITIONS. The power conferred by the charter of the city of Buffalo (Laws N. Y., 1870, chap. 519, tit. 3, § 19) on the common council, "to permit the track of a railroad to be laid in, along, or across any street or public ground," is subject to the qualification that no property rights of abutting owners are thereby invaded, even in cases where the city has acquired the fee of the street in which it authorizes such track to be laid.

3. RAILROAD EMBANKMENT IN STREET NOT A CHANGE OF GRADE AND ABUTTING OWNER ENTITLED TO DAMAGES. In pursuance of leave granted, under such charter provision, by the city council, to a railway company to lay two tracks along the center of a street, the fee of which was in the city, the company constructed, along the middle of that street, in front of plaintiffs' lot abutting thereon, an embankment twenty-four feet wide, and, opposite the corner of plaintiffs' lot, five feet nine inches high, descending gradually for a distance of about three hundred feet, until it reached the street level. The company paved the surface of the twenty-four feet strip, and laid its tracks thereon. The embankment was supported laterally by solid perpendicular stone walls, which, with the railroad occupying its surface, practically excluded plaintiffs from that portion of the street, and also prevented access to their premises from the streets on the other side of the embankment, except by a long circuit; and the only practicable road way left in front of plaintiffs' premises, was but eight or nine feet in width. The grant of leave by the council to the company to occupy the street did not purport to be an exercise of the power conferred by the charter to change the grade of the street, and the formal proceedings prescribed for such change were not taken. Held, that the construction of the embankment was not a mere change of the grade of the street, but was an appropriation of a part of it, practically to the exclusive use of the railroad company, for which plaintiffs, as abutting owners, were entitled to compensation.

**A**PPEAL from superior court of Buffalo, general term. Action by John Reining and another against the New York, Lackawanna and Western Railway Company. A judgment for plaintiffs, entered on the verdict of a jury, was affirmed on appeal by defendant to the general term of the superior court. Defendant again appeals.

*John G. Milburn* for appellant. *David F. Day* for respondents.

ANDREWS, J. The principal question in this case respects the rights of the plaintiffs, as abutting owners, to recover damages occasioned by the construction of the defendant's road in Water street, in the city of Buffalo. The plaintiffs' premises are situated on the northerly side of Water street, and are bounded easterly by Commercial street, westerly by Maiden lane, and southerly by Water street, and occupying the whole lot is a four-story brick building used as a store and residence, constructed before the railroad was placed in Water street. Water street runs easterly and westerly, and has existed for more than forty years. Up to 1875, the plaintiffs owned the fee to the center of the street opposite their premises, subject to the public easement. In that year proceedings were taken by the city of Buffalo to acquire the title to a large number of streets in Buffalo, including Water street, by condemnation, and resulted in the city acquiring the title, upon payment of a uniform and nominal award of five cents damages to each of several hundred owners of lots on the streets taken, including the plaintiffs. In 1882 the common council of the city of Buffalo by ordinance granted to the defendant the right to construct and maintain two railroad tracks "along Prince street, to a point midway between Hanover street and Lloyd street; thence across Lloyd street, at such grade as will permit said company, with a practical construction, to cross Commercial slip at the height fixed by the state engineer; thence, to and along the center of Water street, to the docks of the Delaware, Lackawanna and Western Railway Company at the foot of Erie street." Commercial slip is a part of the Erie canal, and separates Prince street and Water street, and together they form a continuous street except as it is interrupted by Commercial slip.

The defendant, in pursuance of the permission of the common council, and in accordance with the map and profile approved by the council, and under the direction of the city engineer, proceeded to raise the grade on Prince street so as to enable the company to cross Commercial slip by a bridge fourteen feet above the water-line, the height fixed by the state engineer, and to meet this grade of the bridge constructed an embankment in the center of Water street from the bridge westerly for the distance of three hundred feet, passing the plaintiffs' premises. Water street is sixty-six feet wide. The sidewalk on the Water street side of the plaintiffs' lot occupies fourteen feet. The embankment of the defendant is twenty-four feet wide, and at the junction of Water and Commercial streets (at the corner of which is the plaintiffs' lot) it is five feet nine inches high, and from that point descends westerly, by a gradual descent, passes the plaintiffs' lot, and across Maiden lane, and reaches the original level of the street nearly three hundred feet west of the corner of Commercial and Water streets. The embankment is supported laterally by solid, perpendicular stone walls, which extend along Water street in front of the plaintiffs' lot, and across the entrance of Maiden lane. Between the perpendicular stone wall on the northerly side of the embankment and the sidewalk in front of the plaintiffs' building is a space only eight to nine feet wide, which is the only carriage-way left on the Water street side of the plaintiffs' premises. Commercial street extends northerly and southerly from Main street to Buffalo harbor. The raising of the embankment in Water street rendered it necessary to make an embankment in Commercial street to meet the grade of the railroad, and this was done by the defendant. The defendant paved the surface of the twenty-four-foot strip in Water street occupied by its embankment, and laid thereon part of the way one track, and part of the way two tracks, for the accommodation of its business. Carriages or teams cannot cross Water street in front of plaintiffs' premises. This is prevented by the embankment. Access to their premises on the Water street side, from Commercial street south of Water street, is also prevented, except by first crossing Water street, and then passing along the embankment on Commercial street one hundred and thirty feet, and then turning into the road-way on Commercial street between the embankment in

that street and the sidewalk, and thence into Water street, or else, when reaching the junction of Commercial and Water streets, by turning west, and driving down the embankment along the railroad tracks, about three hundred feet, to the end of the grade, and then turning, and going westerly along the narrow roadway, eight or nine feet wide, on the northerly side of the embankment. This space is not sufficient to allow wagons to pass each other, nor can a single wagon with horses be turned around in this space, except with difficulty. It was conceded that the plaintiffs, up to the time of the trial, had sustained damages, in the diminished rental value of their premises by reason of the embankment, in the sum of \$525, for which sum a verdict was rendered, and no question now arises as to the rule of damages or the amount, provided, upon the facts, damages are legally recoverable.

The counsel for the defendant rests his claim that the judgment should be reversed upon two general propositions—*First*, that the laying of tracks for the running of cars by steam on the grade of a city street, and the operation of trains thereon under legislative and municipal authority, where the fee of the soil is in the municipality, violates no property rights of an abutting owner, and consequently, in the absence of a special statute authorizing compensation, he is without remedy, although his property may be injured; and, *second*, that the erection of the embankment to accommodate the street to the use of the defendant was merely a change of grade which it was competent for the city to authorize in its discretion, and that such change of grade, although it damaged the plaintiffs' property, was, within the Case of Radcliff's Ex'rs, 4 N. Y. 195, *damnum absque injuria*. The tracks, it is said, were placed on the new grade, and, therefore, on the surface of the street; and the case, it is claimed, is not distinguishable in principle from what it would have been if, without any change of grade, the tracks had been laid on the original surface of the street. There is a third subordinate defense insisted upon, viz., that the charter of Buffalo gives a special remedy for injuries to lot-owners from a change of grade of streets, and that this remedy is exclusive, and was the only one open to the plaintiffs.

The first proposition is sustained by our recent decision in

Fobes v. Railroad Co., 121 N. Y. 505; 24 N. E. Rep'r, 919. Prior to that decision it had been decided in *People v. Kerr*, 27 N. Y. 188, and in *Kellinger v. Railroad Co.*, 50 N. Y. 206, which followed it, that the laying of horse railroad tracks in the streets of the city of New York, the fee of which was in the city, was consistent with their use as public, open streets, and with the trust upon which the streets were held, and that abutting owners had no remedy for any consequential injuries they might sustain from the construction and operation, under legislative authority, of a horse railroad in the street, in the absence of any negligence. The case of *Williams v. Railroad Co.*, 16 N. Y. 97, was that of a steam railroad over lands previously dedicated by the owner for a street, where he retained the fee; and it was held that such a use was not within the scope of the dedication, and that the legislature could not authorize such use except on condition of making compensation to the owner of the fee. The same doctrine was applied, under similar circumstances, to the case of a horse railroad in *Craig v. Railroad Co.*, 39 N. Y. 404. These latter cases, as will be observed, decide the principle that neither a horse nor steam railroad can be authorized, in streets the fee of which is in the adjacent owner, without his consent; while the former cases hold that, where the fee is in the municipality, horse railroads may be authorized against the will of the abutting owner, and without making compensation. The distinction is made to rest on the location of the fee. The case of *Fobes v. Railroad Co.*, supra, presented the distinct question whether the construction of a steam surface railroad, part of a long line of railroad, on the ordinary grade of a street, under legislative authority, subjected the company to liability for consequential injuries to the lot of an abutting owner whose lot was bounded by the side of the street, and who had no title to the soil therein. It was urged on behalf of the plaintiff that the cases relating to horse railroads were not applicable by reason of their different purpose, such railroads being primarily designed for street traffic, and steam railroads, such as that then in question, for ordinary railroad traffic, and also that the one, by reason of the different motor, imposed a different and increased burden on the street from that imposed by the other, and interfered to a much greater extent with the enjoyment of the street by abutting owners.

The opinion of Judge Peckham in that case contains a careful review of the street-railway cases in this state, both in this court and the supreme court, and it was shown that it had become the settled doctrine of our courts that, as against abutting owners having no title to the bed of the street, it was competent for the legislature to authorize the construction of a steam surface railroad therein, without making compensation to the owners of the abutting property injured by such construction, and that there was no legal distinction between the case of a railroad operated by horses and one operated by steam-power, and the court reversed the judgments below in favor of the plaintiff. The court in its opinion distinctly limits the doctrine to cases where the railroad is laid on the same grade as the street, leaving the street substantially free and unobstructed for ordinary travel. The learned judge, after referring to the law as established in this state on the subject, says: "The company was, therefore, not liable to such an owner for any consequential damages arising from a reasonable use of the street for railroad purposes, not exclusive in its nature, and substantially on the same grade as the street itself, and leaving the passage across and through the same free and unobstructed for public use." And again, after showing that there was no difference in principle between the cases of a steam and horse railroad, he says: "If the use of either becomes unreasonable, excessive or exclusive, or such as would not leave the passage of the street substantially free and unobstructed, then such excessive, improper or unreasonable use would be enjoined, and the adjoining owner would be entitled to recover damages sustained by him therefrom, in his means of access, etc., to his land."

It is no longer open to debate in this state that owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation. The right of abutting owners in the street is not, however, of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation or improvement of the streets in the public interests, although it may be made to appear

that the privileges which they had theretofore enjoyed, and the benefits they had derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed. The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot-owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change is made under lawful authority. This, it is held, is not a taking of the abutting owner's property, and the injury requires no compensation. The hardships arising from the application of this rule of law has led to constitutional amendments in many of the states, providing for compensation for property damaged as well as taken in the prosecution of public improvements. In this state the law and the constitution are unchanged. But that there is a limitation to public powers over the streets of a city, which cannot be transgressed without invading the constitutional rights of abutting owners, was a principle announced in the Story Case, 90 N. Y. 122, and confirmed and broadened so as to apply to other circumstances in the subsequent cases. The elevated railroad structure, the subject of complaint in the Story Case, occupied with its supports and stairways portions of the street, and such occupation was necessarily exclusive, and this fact was prominently brought into view in the opinions delivered. The parts of the street so occupied could not be used for general street purposes. This fact, it is claimed, distinguishes the present case from that, and it is insisted that this case is more nearly allied to the Fobes Case than to that of Story. It is true that the part of the street occupied by the embankment of the defendant is still a part of Water street. It is also true that the occupation of the embankment by the tracks of the defendant was not necessarily exclusive — that is to say, it is possible for ordinary vehicles to traverse the embankment longitudinally — but such travel would subject the traveler to the risk of meeting railway trains on the narrow causeway, and he would have no opportunity to turn off the embankment, except by driving over the perpendicular

lar wall which supports it. The plaintiffs are practically excluded from the use of that portion of the street by the presence of the railroad there. They and their customers cannot drive across it, and if they had the temerity to drive along it, nevertheless they would be compelled to make a long circuit to reach the plaintiff's premises from the streets south of the embankment. The only practicable road-way in front on Water street is but a few feet in width, quite insufficient for a safe and convenient way to and from their lot.

We think the public cannot justly demand such a sacrifice of private interests, or justify such an appropriation of a street by a municipality in aid of a railroad enterprise. The *Fobes Case* gives no countenance to the defendant's contention. The limitations upon legislative and municipal authority, so carefully stated in the passages quoted from the opinion, are distinctly opposed to such an assumption. That case, and those of *Kerr* and *Kellinger*, were cases of railroad tracks laid upon the general grade of city streets, as such grade existed when the tracks were authorized. There was no exclusive appropriation in fact of any portion of the surface by the companies, except that the rails were imbedded in the soil. The whole street in each of these cases remained open and unobstructed, except that the existence of the tracks, and the operation of the respective roads thereon, rendered access to the lots of the abutting owners somewhat less safe and convenient than before. Here, as the evidence tends to show, the city of Buffalo, for the convenience, and presumably upon the application, of the defendant, devoted the center of Water street to what is practically the exclusive use of the defendant, leaving for the use of the plaintiffs a narrow and inconvenient road-way, separated from the center of the street by a barrier therein impassable for carriages from east to west, opposite the plaintiffs' lot on Water street, and only theoretically open from north to south, and then only by a circuitous route. It is quite probable that the general interests of Buffalo and of the larger public are promoted by this appropriation of the street, but it by no means follows that a lot-owner, whose property is injured should bear the loss for the public benefit. We think the case falls within the principle of the *Story Case*, and that while the law now is that it is competent for the legis-



lature to authorize railroad tracks, either for steam or horse railroads, to be laid on the ordinary grade of streets, the fee of which is in the state or municipality, without making compensation to abutting owners for consequential injuries to their property, the legislature cannot legally authorize structures for railroad purposes to be erected therein for the use and convenience of railroads which practically exclude the abutting owners from the part of the street so occupied, without compensating them for the injury suffered, and that it is not necessary that there should be an actual physical exclusion of the lot-owners from the use of that part of the street occupied by such structures in order to entitle them to a legal remedy. It is enough if such part of the street is practically and substantially closed against them for ordinary street uses.

The power conferred by the charter of Buffalo upon the common council, to "permit the track of a railroad to be laid in, along or across any street or public ground" (Laws 1870, chap. 519, tit. 3, § 19), must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. The present controversy could not have arisen prior to 1875, when the plaintiffs were owners of the fee to the center of Water street. They would then, under the settled law, have been entitled to compensation. The city of Buffalo, having in that year acquired, for the nominal consideration of five cents, the technical fee in the street, proceeded afterwards to authorize the laying of the tracks in question, and it is now claimed that this change in the title defeats the plaintiffs' right to compensation. This is probably true if what has been done by the defendant under license of the city was simply the laying of its tracks on the surface of the street at its ordinary grade; but this was not the character of the change effected.

The second proposition of the counsel of the defendant, that the building of the embankment was a mere change of grade of Water street, made under the authority of the city, is, we think, untenable. The charter of Buffalo gives plenary power to the city to fix and change the grade of streets by formal proceedings, and provides that, when a grade is established or altered, a description of such grade shall be made and recorded by the city clerk. Charter 1870, tit. 9, §§ 1, 2, 6. The action of the com-

mon council, granting permission to the defendant to occupy Water street, while it involved, as a consequence, the construction of an embankment in Water street, did not purport to be an exercise of the power to change the grade of the street under the charter. It does not appear that any description was made or recorded, as is required when a new grade is established. It would be a strained construction to regard the action of the council as a change of grade of Water street under the charter provisions. The defendant desired to lay its tracks in Water street, and the other streets mentioned in the grant; and to enable it to do this, and to cross Commercial slip, an embankment in the street was authorized. The grade of Water street was not altered, but the defendant was permitted to build an embankment in the street for its railway. The fact that what was done did effect a change in the grade of that part of the street occupied by the embankment does not prove that what was done was in the execution of the power to alter the grade of streets conferred on the council. The primary object of this power contained in municipal charters is to enable the municipal authorities to render a street more safe and convenient for public travel; to afford drainage; in short, to adapt it more perfectly for the purposes of a public way. It is claimed that the city under this power could lawfully authorize an embankment in part of the street, leaving the other part on a lower level. We are not called upon to say whether there is any limit to the exercise of municipal authority, or that they cannot in exercising the power to establish and alter the grade of streets, raise an embankment in a part of a street, if in their judgment this will promote the public convenience and the purposes of the street as a highway. But we think they cannot, under the guise of exercising this power, appropriate a part of a street, to the exclusive, or practically to the exclusive, use of a railroad company, or so as to cut off abutting owners from the use of any part of the street in the accustomed way, without making compensation for the injury sustained.

We have held that the authority conferred by the general railroad law upon railroad companies to cross highways in the construction of their lines authorizes their construction on, over or below the grade of the highway crossed, and that incidental changes of the grade of the street, rendered necessary, to accom-

moderate railroad crossings, gives no right of action to abutting owners who may sustain injury. *Conklin v. Railway Co.*, 102 N. Y. 107; 6 N. E. Rep'r, 663. The practice of permitting railroads to cross highways is coeval with the introduction of the railroad system in the state, and the decision comports with the general understanding of the bench and the bar. In case of railroad crossings the highway is left as before. No part of it is taken or exclusively appropriated by the railroad company. In these cases there is no use of the highway for railroad purposes. Railroads, of necessity, intersect highways; and it is held that the state may permit them to be crossed by a railroad company, and that this involves an invasion of no substantial right of the owner of the fee. We ought not to extend the doctrine of the crossing cases to unreasonable limits, and we think it cannot be applied to justify the exercise of the public powers attempted in the present case. The *Ottenot Case*, 119 N. Y. 604; 23 N. E. Rep'r, 169, related to the right of an abutting owner on Commercial street to recover damages for the raising of the embankment on that street in front of his premises to meet the grade on Water street. The members of the court agreed that the judgment should be reversed under the *Uline Case*, 101 N. Y. 98; 4 N. E. Rep'r, 536, for error in the rule of damages. It was the opinion of the learned judge who wrote in that case that the plaintiff could not recover, for two additional reasons—*First*, that as the plaintiff "was not an abutting owner on Water street, and had no rights therein," he had no right to complain because of the construction of the railroad therein; and, *second*, that the raising of the embankment in Commercial street was, in legal effect, a change of grade by the city, and, therefore, there was no actionable injury. The plaintiffs here are abutting owners on Water street, and their claim is not subject to the objection made to the claim of Ottenot in the first ground mentioned. If the second ground is tenable, it must rest, we think, on the point that the plaintiff Ottenot had no right to question the legality of the structure in Water street, and, therefore, that the accommodation of the grade in Commercial street to meet the grade on Water street was, in a proper sense, a change of grade for street purposes. The *Ottenot Case* does not, we think, control the present one, and, assuming that in that case the embankment on Commercial street could be regarded

as a change of grade under charter powers, the embankment on Water street cannot be so regarded. The point that the charter confines the plaintiffs to a remedy against the city, is based upon a provision of the charter (tit. 9, § 17) that, "when the city shall alter the recorded grade of any street or alley, the owner of any house or lot fronting thereon may, within one year thereafter, claim damages by reason of such alteration." The conclusion we have reached, that the action of the city in granting permission to the defendant to construct an embankment in Water street was not a change of grade in the street within the charter provisions, disposes of this question.

The charter provision was intended to afford a remedy for damages from changes of grade where none existed before, and to cases to which it applies the remedy, is necessarily exclusive. *Heiser v. Mayor, etc.*, 104 N. Y. 68; 9 N. E. Rep'r, 866. Here the plaintiff, as we hold, has a common-law remedy for his injury, and this is not cut off by the provision in the charter. We think the judgment should be affirmed.

GRAY, J. I concur with Judge Andrews. In Judge Earl's opinion in the *Ottenot Case*, 119 N. Y. 603; 23 N. E. Rep'r, 169, in which I also agreed, the street, a portion only of the grade of which was changed by raising, was not subjected to or burdened by other uses. It remained, as much as ever, in other respects, an ordinary street. The change of the grade was in the general public interests, and the moving cause for the change did not affect the complexion of the question in the case. The plaintiff's property in that case did not abut upon Water street, and he had no right to complain of the railroad structure or embankment in question. Here the object was to subserve the railroad use, and the appropriation by the defendant of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property-owner's appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses. I think we have, in the present case, the element of an appropriation by the defendant of the street by a permanent structure and obstruction, and hence it must fall within the spirit, if not the letter, of our decision in the

Story Case. All concur except Earl and Finch, JJ., dissenting.\*

#### STEAM RAILROADS IN STREETS — RECENT DECISIONS.

1. **Right of abutting owner to damages when constitution provides for compensation for property taken only.**— It is declared to be the settled law of Kansas that to entitle a person owning lots abutting on a city street, along which a railroad company has constructed and is operating its line, by authority of the city council, to recover damages, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress to and egress from them, and that when the location of the track is such that space enough is left in the street in front of the lots of the abutting owner, so that he can pass between the sidewalk and track, and the railroad is operated in a legal and proper manner, the lot-owner cannot recover because the space within which he has heretofore passed from and to his lots is restricted. *Railway Co. v. Cuykendall*, 42 Kans. 234; 21 Pac. Rep'r, 1051; *Wichita, etc., R. Co. v. Smith*, 45 Kans. 264; 25 Pac. Rep'r, 623; *Kansas, etc., R. Co. v. Mahler*, 45 Kans. 565; 26 Pac. Rep'r, 22; *Herndon v. Kansas*, 46 Kans. 560; 26 Pac. Rep'r, 958. In these cases it appeared that the plaintiffs had from twenty-seven to thirty-four feet between their lot lines and the railroad track, and it was held that they could not recover.

The owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee in the street, an easement in the street to its full width, in front of his lot, for the purposes of access, light and air, which constitutes property, and cannot be taken from him for public use without compensation, and the construction and operation of a surface railroad in the street is a taking to the extent it interferes with such easement. *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; 47 N. W. Rep'r, 455. The case of *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505; 8 Am. R. R. & Corp. Rep. 182, is disapproved as inconsistent with the doctrine of the elevated railroad cases. The court very properly observes "if the abutting owner, independently of the ownership of the fee in the street, has an easement in the street in front of his lot to the full width of it for the purposes of access, light and air, which is property, and cannot be taken from him without compensation, it is difficult for us to see what difference it makes whether the easement is taken away or its enjoyment interfered with by a railroad constructed and operated on the surface of the ground, or at an elevation above it." The doctrine of this case is followed and approved in *Papoosehek v. Winona, etc., R. Co.*, 44 Minn. 195; 46 N. W. Rep'r, 829; *Hayes v. Chicago, etc., R. Co.*, 46 Minn. 849; 49 N. W. Rep'r, 61.

The Minnesota court holds that the compensation must be limited to the damages occasioned by interfering with the easement appurtenant to the particular lot in question, that is the evidence must be confined to the effect of the construction and operation of the road directly in front of the lot and the effect of that part of the road on either side of the lot is immaterial, also that only the effect of interfering with the easements of access, light and air can be considered, and that effects of noise, jarring, etc., must be excluded. *Adams*

\* Reported in 28 N. E. Rep'r, 640; 128 N. Y. 157.

v. Railway Co., 39 Minn. 286; Lamm v. Chicago, etc., R. Co., 45 Minn. 71; 47 N. W. Rep'r, 455; Demueles v. St. Paul, etc., R. Co., 44 Minn. 486; 46 N. W. Rep'r, 912.

In *Hayes v. Chicago, etc., R. Co.*, 46 Minn. 349; 49 N. W. Rep'r, 61, it appeared that plaintiff abutted on a *cul de sac* from which there was no outlet except across defendant's road and that defendant obstructed the outlet every day by leaving its cars standing across the way for hours at a time. It was held that the plaintiff's right to recover was the same as though the obstruction had been by an embankment or trestle, and that the intermittent character of the obstruction only affected the amount of damages. See, also, *Lakkie v. Chicago, etc., R. Co.*, 44 Minn. 438; 46 N. W. Rep'r, 912.

**2. Right of abutter to damages when constitution provides for compensation for property damaged as well as for property taken.**—We believe it is the universal rule that the abutting owner is entitled to damages in such cases. *Hot Springs R. Co. v. Williamson*, 136 U. S. 121; *Fox v. Baltimore & O. R. Co.*, 34 W. Va. 466; 13 S. E. Rep'r, 757; *Highland Ave. R. Co. v. Matthews (Ala.)*, 10 So. Rep'r, 267; *McQuaid v. Portland, etc., R. Co.*, 1 Am. R. & Corp. Rep. 34, and note, p. 54.

A complaint alleged that defendant railroad company was proceeding to lay a track within eight feet of the curb-stone in the street in front of plaintiff's premises, while the ordinance authorizing the use of the street directed the road to be located fifteen feet from the curb-stone, and to raise the grade of the street above the established grade, which it had no right to do, obstructing the street, and entirely cutting off plaintiff's only means of ingress and egress by wheeled vehicles, endangering her property by fire, and the lives of her family, obstructing the natural flow of the water, and turning it upon her premises. Held, that it stated a case of special damage not suffered by the public in general, and showed the right to an injunction. *Chicago, etc., R. Co. v. Elsert*, 127 Ind. 156; 26 N. E. Rep'r, 759.

**3. Right to damages when railroad wholly on further half of street.**—The building of a railway track along a street, more than ten feet east of the center line, is not an appropriation of property abutting on the west side thereof, for which damages can be recovered. *Trustees of First Cong. Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158; 45 N. W. Rep'r, 1086.

**4. Gates and barriers at crossing—whether owner of fee entitled to compensation.**—Where gates and barriers for the protection of the public are built and maintained in the street upon plaintiff's lot, by a railway company, in compliance with an order of the common council, the company is not liable in damages for a taking of the property. *Trustees of First Cong. Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158; 45 N. W. Rep'r, 1086.

**5. Whether additional track in street gives right to further compensation.**—A railroad company, which has located a single track along a city street under an ordinance granting it the right to construct its railroad along the street within certain limits, and under general proceedings of appropriation, in which damages were assessed to adjacent land-owners, is not restricted to one track, but has the right to construct additional tracks if required by its business, if there is sufficient room to do so within the prescribed limits, without paying additional damages. *Chicago, etc., R. Co. v. Elsert*, 127 Ind. 156; 26 N. E. Rep'r, 759.

6. **Meaning of the words "line of the railroad" in ordinance fixing limits of location in street.**—An ordinance granting a railroad company the right to build its road in a street provided that the company should grade the street, and that "the line of the railroad shall be located so as not to approach the sidewalk curb-stone nearer than fifteen feet." Held, that the words, "line of the railroad," did not mean the extreme limit, including ties and grade, or the center or thread of the track; but referred to the rails, they being the only part of the road raised above the grade of the street. *Chicago, etc., R. Co. v. Eisert*, 127 Ind. 156; 26 N. E. Rep'r, 759.

7. **Damages for decrease of rents where market value increased.**—In an action by the owner of abutting property against the company for damage to the freehold and for diminishing the annual value of the premises for use, there can be no recovery as to the freehold where the market value has been increased, but as to the latter there may be a recovery, notwithstanding such increase in the market value. A wrong-doer cannot set off increase of market value, caused by his wrongful act, against loss of rents and profits occasioned thereby. *Davis v. East Tenn., etc., R. Co.*, 87 Ga. 605; 13 S. E. Rep'r, 567.

8. **Remedy by injunction.**—A temporary injunction restraining the construction of a side track or turn-out for a steam railway in the streets of a city may be granted at the instance of a citizen alleging special damage to his real estate located in the vicinity of the nuisance, and, though the evidence be conflicting as to whether he will sustain special damage or not, the discretion of the judge in granting the injunction will not be controlled unless abused. *Savannah, etc., R. Co. v. Woodruff*, 86 Ga. 94; 13 S. E. Rep'r, 156. But see *Kemble v. Railroad Co.*, 140 Penn. St. 14; 21 Atl. Rep'r, 225.

9. **Judgment as to one lot bars suit as to another lot by the same plaintiff.**—A railway having been constructed along a street on which plaintiff owned two lots, a few hundred feet apart, he obtained judgment for damages to one of them arising from the construction and operation of the road. Held, that this was a bar to a suit for damages to the other lot, accruing prior to the filing of the complaint in the first suit, from the same cause. *Beronio v. Southern Pac. R. Co.*, 86 Cal. 415; 24 Pac. Rep'r, 1093.

## CITY OF GRAND RAPIDS V. POWERS.

(Supreme Court of Michigan, Dec. 21, 1891.)

1. **RIPARIAN RIGHTS. ESTABLISHMENT OF DOCK-LINES BY MUNICIPAL CORPORATIONS. NECESSITY OF NOTICE.** A city cannot by ordinance, under authority of the legislature, fix an arbitrary dock-line in a navigable river, in the bed of which the riparian owners have absolute property, subject only to the public right of navigation, without notice to such owners.

2. **DOCK-LINES ENCROACHING UPON PRIVATE PROPERTY.** The fixing of such line, so as to pass across the natural bank of the river at certain points, is unconstitutional, as taking private property for public use without compensation.

3. RIGHTS OF RIPARIAN OWNERS WHEN STREAM NOT NAVIGABLE. At a point in such river occupied by rapids, and thereby entirely unfitted for navigation proper, and where the center of the stream only is useful for floating logs, a dock-line cannot be fixed so as to prevent the riparian owner building out to the center of the stream such structures as do not interfere with the public uses of the stream or with the rights of other riparian owners.

**A** PPEAL from superior court of Grand Rapids in chancery, Edwin A. Burlingame, judge. Suit by the city of Grand Rapids to enjoin the building of a wall in the Grand river by William T. Powers. From a decree granting an injunction defendant appeals. Reversed.

*Blair, Kingsley & Kleinhans (E. F. Uhl, of counsel) for appellant. Wm. Wisner Taylor for appellee.*

MORSE, J. Grand river is one of the largest and most important inland streams of the state. It is a navigable river. It has been a water highway, upon which for many years logs and lumber have been floated from the pineries to the lake at Grand Haven, or to mills at various points upon the river bank. It has never been navigable for boats, except canoes and *bateaux*, above Lyons, and no steamboats have been above the rapids at Grand Rapids for many years. Small steamboats have run between the mouth and the city of Grand Rapids, and, with the aid of government appropriations, the river, below the rapids at that city, may be made to be a water-way of great commercial utility; but above the rapids it has nearly served its usefulness as a navigable stream, except for small pleasure boats. The running of logs, lumber and timber upon it is no longer of consequence, on account of the exhaustion of the forest supply of easy access to it and its tributaries. But it will ever be an important public stream, and its navigability for pleasure is as sacred in the eye of the law as its navigability for any other purpose. Its waters empty into Lake Michigan, and from thence flow into the St. Lawrence and to the sea; and under the ordinance of 1787, as well as the laws of our state, it must be regarded in the main as a public river and a common highway. It passes through the city of Grand Rapids, dividing the place into two parts, known as the "East" and "West" sides. "The Rapids" take up within the city limits about two miles of the river. The fall of the river



bed is such that the water, in the natural state of the river, flowed with such velocity at a shallow depth, among numerous rocks and boulders, over these rapids, as to entirely prevent any navigation, except with canoes; and it was always with great difficulty that one of these could be poled up the stream. The character of the underlying soil of the river here is rocky — ledge rock between the dam and Bridge street, and below that it is composed of clay boulders and gravel, with ledges of rock occasionally cropping out. There never has been a steamboat up or down these rapids but once, and then it had to be drawn up by oxen, horses and Indians. Logs could never well be floated down without improvements of the channel. The rapids, in a state of nature, served no useful end in any kind or method of navigation. Upon the east bank of the river, and below the dam, extensive encroachments have been made by property-owners, the first beginning of such encroachments dating back many years, and almost from the first settlement of the country; and made lands, and buildings upon them, of the value of millions of dollars, are now located in the old river bed upon that side. The defendant, William T. Powers, in 1866, was the owner of the west bank of the river from a point above the present dam down to a point below the Grand Rapids and Indiana railroad bridge. The river near by, and within the city limits, is spanned by seven bridges, in the following order from the north to the south: The Detroit, Grand Haven and Milwaukee railroad bridge, Leonard street bridge, Sixth street bridge, Bridge-street bridge, Pearl street bridge, Grand Rapids and Indiana railroad bridge, Fulton street bridge and Chicago and West Michigan railroad bridge. Five of these are maintained by the city. None of these, except the last, have any draw or openings for the passage of boats, and they are comparatively low bridges, with their supporting piers resting upon the bed of the river.

In 1866 and 1867, Powers in connection with other riparian owners, and with municipal and legislative consent, built a dam across the river. This dam is about six hundred and fifty feet in length, and about seven feet in height. A chute was put in to accommodate and facilitate the running of logs over the dam. Powers at the same time, and in connection with his dam, built a canal along the line of his lands, upon the west side, which is about two-thirds of a mile in length. Part of it was built in the

natural ground and part encroached upon the shallow waters of the original stream. The water of this canal is about nine feet deep, and varies in width from fifty to one hundred feet. This improvement is worth many thousands of dollars. In 1885 the legislature, by Act No. 292 of the Local Laws of that year, amending the charter of Grand Rapids, conferred power and authority on the board of public works of the said city of Grand Rapids to establish dock and building lines on the shores and margin of Grand river within the corporate limits of said city, and in the waters and in the bed of said river along the said shores and margin, beyond which said lines, when so established, no dock, wharf, building or structure of any kind, except public bridges, should be constructed in said river, or on or over the bed thereof, nor should the water be in any manner obstructed beyond said established lines; and authorized the common council of said city to enforce the power thus granted, relating to the establishment of such lines, by ordinances duly enacted in that regard, and authorized said common council to impose appropriate penalties for that purpose within the limits prescribed by said charter of said city; and also provided that the ordinances or regulations of said common council, in relation to said dock-lines, might be enforced at the suit of said city by bill in equity. Afterwards, acting under this authority, the board of public works of said city, on the 3d day of May, 1886, established a dock and building line on the shores and margin of said Grand river within the corporate limits. On the 26th day of July, 1886, the common council of said city passed an ordinance entitled "An ordinance to prohibit and prevent the erection of buildings, docks and other structures, and to prohibit and prevent the filling in of earth or other material, on the shores of Grand river, or obstructing the waters of Grand river, beyond the dock and building lines established by the board of public works," which was afterward amended on the 30th day of January, 1888. This ordinance prohibited any encroachment upon the river shore or bed of any kind outside of the established dock-lines. These dock-lines were established by the board of public works without notice to Mr. Powers or any of the riparian owners along such lines; nor does it appear that they were consulted in regard to the location of such lines.

After the establishment of these dock-lines, Mr. Powers commenced the building of a wall in the stream. The wall was built of stone, and about four feet wide; and the defendant admits that he had constructed said wall to about the following dimensions: "Commencing at or near the southerly end of the waste-weir of the West Side canal, so called, in said city, near the dam across said Grand river; thence extending south-easterly sixty-six feet, more or less to a point just about forty-five feet east of the said pretended dock and building line so pretended to be established by the board of public works; thence extending southerly on a line which, if extended, would meet the public bridge over said Grand river at East Bridge street in said city, at a point about thirty feet east of said pretended dock and building line." He also admits that he intends to build said wall from the dam to Bridge street, and for his own purposes, and that the same is and will be outside the said dock-lines.

The city of Grand Rapids files its bill of complaint in the superior court of Grand Rapids, in chancery, basing its right for relief upon the legislative act aforesaid, and the action of the board of public works and the common council, under the authority given these bodies by such act, and claiming — *First*, that the structure was unlawful by reason of such act, and the proceedings under it; *second*, that such wall is of great damage and detriment to the public use of the stream, as it would greatly narrow the natural channel, and impede the flow of the water therein, and in times of high water would cause the waters of the river to be held back, and overflow and flood various portions of the city and its public streets, thereby causing great public and private damage, and occasion sickness to the inhabitants of the city by causing the ground thus overflowed to be damp and foul; *third*, that it will interfere with the public use of the river, and its value for the purposes of commerce, for the floating of vessels, boats, rafts and logs. The bill prays that the defendant may be temporarily, and also permanently, enjoined from building the wall, or any other wall outside of the said dock-lines, and that he be decreed to remove said stone wall by him constructed.

The defendant answering avers that by virtue of his riparian rights, he owns the soil and bed of Grand river to the center thereof; that he has a right to make such use of the bed of said

stream within his said ownership as he sees fit, provided only that he does not interfere with the public use of said stream for the purposes of navigation, or with the rights of other riparian owners upon its banks; and denies that this dam so built, or as it is intended to be constructed, interferes at all with the public use of said river, or with the rights of other riparian owners; and further avers that the same, when completed, will be a benefit rather than a damage to the public and all concerned.

It is admitted that under the settled law of this state, the defendant is the owner, by virtue of his riparian rights, to the soil of the river bed to the middle of the stream. It must also be conceded that he would have had a right to build this wall, and to reclaim for his own use the land between it and the old west shore of the river, if such building of the wall and reclamation of the land did not interfere with the public right of navigation, or the private right of other owners of the river bank, had it not been for the act of the legislature in question, and the subsequent proceedings of the authorities of the city of Grand Rapids under and by virtue of such act. The ordinance of 1787 cuts no particular figure in this case, because, under the decisions of the federal courts, as far as the general government is concerned, the rights of riparian owners on the stream, mentioned or embraced by said ordinance, must be determined according to the law of the state within which they are situated. *St. Louis v. Myers*, 113 U. S. 566; 5 Sup. Ct. Rep'r, 640; *Barney v. Keokuk*, 94 U. S. 324; *Bridge Co. v. Hatch*, 125 U. S. 1; 8 Sup. Ct. Rep'r, 811. Grand river must be treated the same as any other navigable stream under the law of our state in the solution of this question, having regard, however, to its character as a stream considered at the point toward which this legislation is directed, and where the rights involved are located. In the court below, the city seems to have rested its case entirely upon the validity of this dock-line legislation, and proceedings taken under it, and no particular effort was made to show that the wall was or would be injurious to either public or private rights.

The dock-line, as established, cannot be sustained for two reasons: *First*. The persons owning the banks of the river in fee simple, and having absolute property in the river bed, subject only to the public right of navigation, were not notified of the proposed

action of the board of public works, and had no hearing upon the establishment of these dock-lines. The fixing of these lines was an *ex parte* and arbitrary proceeding, involving the rights of property-owners, upon which they have never had a day in court. Whatever may be held to be the authority of the legislature in respect to establishing such lines, it cannot certainly be done without notice to property-owners, and opportunity of a hearing accorded to them. This would be despotism, and without due process of law no man's rights can be submitted, under a constitutional government, to the discretion of any one without notice or hearing. *Robison v. Miner*, 68 Mich. 549; 37 N. W. Rep'r. 21; *Frazee's Case*, 63 Mich. 396; 30 N. W. Rep'r, 72. *Second.* The dock-line as established encroached upon the shore-line of defendant, and the ordinance of the common council, therefore, prohibits him from building upon and occupying his own land, which has never been covered with water. The testimony of the city engineer, Mr. Collar, a witness for the complainant, shows, on cross-examination, that the dock-line on the west side of the river in many places runs upon and along the east edge of the top surface of Mr. Powers' canal for some distance. At some points it is nine feet, and at others more, west from the water-line of the river at ordinary stages, and at the south end of the canal the dock-line cuts off a strip of mainland of some feet in width, and a part of the mainland shore of the river.

This dock-line as fixed runs through buildings, and cuts off a part of the Crescent Mills, which have been built more than twenty years, and passes through other buildings. It must be held that the legislature has no power to extend dock-lines upon the natural shore or bank of the river, or to authorize the municipality to forbid the owners from building upon such shore or bank. This would be taking private property for public use without compensation, which is forbidden by our constitution. For these reasons alone the bill in this case must be dismissed, as there is nowhere in the evidence any showing that the building of the wall will be of any damage to the public use of the river for the purpose of navigation, or any injury in any way to the rights of the public or private persons.

But the question of grave concern remains, to-wit, what are the rights of the defendant as a riparian owner in this river, and

what control can the municipality under authority of the legislature lawfully exercise over such rights? And it seems to me desirable that this question be settled, as it is conceded to be an open one, as far as the courts of this state are concerned, and one of great moment to the public as well as to private interests. In examining this question we must remember that the riparian proprietor in this state holds a different and more extended title to the soil under water of a navigable stream than he does in many of the states of the Union. In this state he owns the soil to the middle of the stream, and has the right to use his land which is covered by water in any way he chooses, provided that he does not seriously injure the public use of the stream, or obstruct or impede navigation, or damage other riparian owners along the stream above or below him. "Any erection which can lawfully be made in the water within these lines belongs to the riparian estate; and the complete control of the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large to the navigation, and such other use, if any, as appertains to the public over the water. \* \* \* In those waters whose beds are public, and not private, property, erections by riparian owners are unlawful, not because they are nuisances, in the proper sense of the term, but because they are encroachments upon the public domain, and they are as unauthorized as would be the erection of houses or barns upon public lands away from the water, by an adjoining land-holder. But where the ownership is private, and the public rights are simply easements or privileges upon it, the owner may do what he pleases, so long as it does not injuriously affect the public enjoyment. On land, where roads are laid out of a prescribed width, the law or the authorities having determined that width to be desirable, the right to encroach upon the way cannot be very extensive. But where the way exists in a water-course, whose boundaries are variable and laid down without human intervention, the extent to which private improvements are compatible with the public use must depend upon the circumstances, and must always be a question of fact. The owner's use is lawful until shown to be unlawful.

It is plain enough that there are streams which cannot safely be encroached upon at all, while there are others so considerable

that they could not be appreciably injured by a very extensive system of dockage or other erections in their beds." *Ryan v. Brown*, 18 Mich. 196. See, further, as to the ownership and rights of the riparian owner in the bed of streams, *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddiman*, 10 Mich. 125; *Watson v. Peters*, 26 Mich. 508; *Richardson v. Prentiss*, 48 Mich. 88; 11 N. W. Rep'r, 819; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 182; *Maxwell v. Bridge Co.*, 41 Mich. 466; 2 N. W. Rep'r, 639; *Boom Co. v. Adams*, 44 Mich. 403; 6 N. W. Rep'r, 857; *Backus v. Detroit*, 49 Mich. 110; 13 N. W. Rep'r, 380; *Fletcher v. Boom Co.*, 51 Mich. 277; 16 N. W. Rep'r, 645; *Webber v. Boom Co.*, 62 Mich. 626; 30 N. W. Rep'r, 469; *Turner v. Holland*, 65 Mich. 453; 33 N. W. Rep'r, 283; *Attorney-General v. Boom Co.*, 34 Mich. 463.

It is contended by the counsel for the complainant that the legislature of this state has the constitutional right to confer upon the proper authorities of the city of Grand Rapids the authority to establish dock and building lines on the shores and margin of Grand river, and that the defendant had no right to build a wall in the waters of the river beyond the dock and building line established by the board of public works, and to sustain this contention he cites the following: *Cooley Const. Lim.* (5th ed.), 740; *id.*, marg. p. 595; 1 *Dill. Mun. Corp.* (3d ed.), p. 136; *id.*, marg. p. 107; *Hart v. Mayor, etc.*, 3 *Paige*, 213; *Hart v. Mayor, etc.*, 9 *Wend.* 571; *Com. v. Alger*, 7 *Cush.* 53; *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396-398; *Attorney-General v. Woods*, 108 *Mass.* 436; *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 181; *Attorney-General v. Railroad Co.*, 118 *Mass.* 346; *State v. Sargent*, 45 *Conn.* 358. *Cooley* says: "Wharf-lines may also be established for the general good, even though they prevent the owners of water-fronts from building out on the soil which constitutes private property." And in the same connection adds: "And the legislature may prevent the removal of stones, gravel or sand from the beach for the protection of harbors. This is said to be a just restraint of an injurious use of property which the legislature have authority to impose." *Cooley Const. Lim.* (6th ed.), p. 739. This language is plainly used in reference to wharves and harbors upon navigable water, and for the purpose of navigation by boats and vessels. *Dillon* says:

“The right of riparian proprietors in respect to the erection of wharves are subject to such reasonable limitations and restraints as the legislature may think it necessary and expedient to impose; therefore, it is competent for the legislature to pass acts establishing harbor and dock-lines, and to take away the rights of proprietors to build wharves on their own lands beyond the lines, even when such wharves would be no actual injury to navigation.” 1 Dill. Mun. Corp. (3d ed.), § 107. This language has also evidently the same application. In *State v. Sargent*, 45 Conn. 358, the owner of the land took title only to high-water mark. The fee between high and low-water mark was in the state in trust for the public. It was held that the owner of the shore might construct wharves upon the soil below high-water mark, but in so doing must conform to the regulations of the state; and it is said that the duty of protecting the paramount right of navigation rests upon the legislature, and they are to determine for themselves by what methods and instruments they will discharge it. It is further said that the enactment of laws restraining proprietors of the shore from extending wharves or other structures into navigable waters is not the exercise of eminent domain. The public do not appropriate or use any right of the land-owner in the soil of the shore. This is no doubt good law where the land-owner's possession stops at high-water mark, but it does not apply to the case before us. The New York cases cited also refer to cases where the land-owner had no fee in the land under water; *Hart v. Mayor, etc.*, involving rights upon the banks of the Albany basin, which was a work of the state, and created by it. In *People v. Vanderbilt*, the matter in controversy was the construction of a pier in New York harbor. The case of *Com. v. Alger*, 7 Cush. 53, deals with the establishment of harbor lines in Boston harbor, and where, under the colonial ordinance of 1647, the proprietors of uplands bounding on the sea have an estate in fee in the adjoining flats above low-water mark, and within one hundred rods of the upland, with full power to erect wharves and other buildings thereon, subject, however, to the reasonable use of other individual proprietors and of the public for the purposes of navigation, and subject, also, to such restraints and limitations of the proprietors' use of them as the legislature may see fit to impose for the preservation of public and private rights. It was



held that "the legislature of this commonwealth has power to establish lines in the harbor of Boston, beyond which no wharf shall be extended or maintained, and to declare any wharf extended or maintained beyond such lines a public nuisance; and statutes establishing such lines, and taking away the rights of the proprietors of flats in a harbor beyond the lines to build wharves thereon, even when there would be no actual injury to navigation, although providing no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to the public use without compensation, within the meaning of the declaration of rights, article 10, nor as impairing the operation of the grant made by the colonial ordinance, and thus transgressing the prohibition of the constitution of the United States, article 1, paragraph 10, against passing laws impairing the obligations of contracts, but such statutes do not affect the right to maintain wharves erected before their passage." By examining the opinion in this case, it will be seen that the grants of lands, since the adoption of this ordinance, which vested, by virtue of it, an estate in fee in the land lying between high and low-water mark, were also subject to the proviso that such estate should be used so as not to stop or hinder the passage of boats and vessels, etc., and subject to all such restraints and limitations of absolute dominion over it in its use and appropriation as other real estate is subject to for the security and benefit of other proprietors, and of the public, in the enjoyment of their rights. The court justifies its opinion under the police power of the legislature — the authority vested in that body to establish all manner of wholesome and reasonable laws, rules and penalties, not repugnant to the constitution, as they shall judge to be for the good of the commonwealth and the subjects of the same — and holds that the legislation in question is not an appropriation of property to a public use, "but the restraint of an injurious private use by the owner, and is, therefore, not within the principle of property taken under the right of eminent domain." This case is followed in the other Massachusetts cases cited.

The learned counsel also contends that language has been used in several of the opinions of our own court recognizing the right of the legislature to establish wharf and dock-lines, but admits that the question in this case is still an open one, as far as this

court is concerned. The cases in which this matter has been touched upon are: (1) *Lorman v. Benson*, 8 Mich. 18. In the course of the opinion Mr. Justice Campbell said: "It is urged that this ruling will interfere with the improvement of rivers, and disturb the title of islands. But these objections are not well taken. The public authorities can regulate water highways, as well as land highways, although the soil of neither belongs to the state." (2) *Rice v. Ruddiman*, 10 Mich. 126. Mr. Justice Christancy in his opinion says, at page 140: "These principles, when applied to Muskegon lake, can no more interfere with the public right of navigation than when applied to rivers. In both cases the ownership is equally qualified by, and subordinate to, the rights of the public. In fact, navigation is much more likely to be benefited than injured by the application of these principles. Wharves and other similar erections are essential to the interests of navigation; and if the bed of the lake to high or low water mark were vested in the state, no private owner could extend a wharf one foot from the water-line without becoming a trespasser, and incurring the risk of losing his improvements, though navigation might be aided, rather than injured, by it; while, by admitting the riparian ownership as above explained, individual enterprise is stimulated to improvement, and the public interest is subserved. The public through their proper authorities have always the right to restrain any encroachments which may be injurious to the public right, and to compel the removal of any obstruction or impediment, as well as to punish the offender, to the same extent as if the bed of the lake were vested in the state." (3) *Bay City Gas-Light Co. v. Industrial Works*, 28 Mich. 181. In this case Mr. Justice Campbell says, at page 184: "The right of docking out, so as to secure the full benefit of the water front, is limited by the rule that it must not seriously impair the right of navigation. In order to prevent any dispute as to what wharfing will be such an encroachment, it has been provided in some of our city charters that the city may fix a dock-line, beyond which such erections shall not extend. In doing this the authorities are supposed to consult the public convenience, and to draw the line in such a manner as to subserve this. It is usual, and practically almost necessary, to make the frontage thus defined follow straight lines of considerable length, avoiding angles

as much as possible, and paying no attention to the sinuosities of the shore. Such lines will not necessarily or usually be exactly parallel either with the shore or with the thread of the stream. They can have no bearing whatever upon the determination of boundaries, and are meant to determine at what line the depth of water will be found sufficient to meet all the necessities of navigation. So far as they are valid, it is as limits reasonably and impartially fixed, beyond which all are forbidden to wharf out, and within which every person may lawfully improve his own property. But with the ownership of property the city authorities have no concern." (4) *Lincoln v. Davis*, 53 Mich. 375, 19 N. W. Rep'r, 103. On page 390, 53 Mich., and page 111, 19 N. W. Rep'r, Mr. Justice Campbell says: "There can be no doubt of the right of the state to forbid any erections within such parts of the water as are strictly navigable, and to regulate the distance beyond which no private erections can be maintained."

Whatever may be the power of the legislature in waters "strictly navigable" to fix an arbitrary line beyond which riparian owners cannot go, or to delegate to a municipality that power, I am satisfied that no such right exists in the waters of Grand Rapids at the rapids, or certainly in that part of the waters which are not now navigable for any purpose. The right of the riparian owner, under our laws, is subject only to the public use for the purposes of navigation; and there is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless. See opinion, *Campbell, J., Sterling v. Jackson*, 69 Mich. 510; 37 N. W. Rep'r, 845; *Boom Co. v. Jarvis*, 30 Mich. 308; *Middleton v. Boom Co.*, 27 Mich. 533.

There is no pretense in the proofs in this case that this river in front of the land of the defendant has ever been, ever will be, or can be, used for the navigation of commercial boats and vessels;

nor that the water between the existing or proposed wall of the defendant and his shore-line has been, will be, or can be used even for the floating of logs or rafts. It has never been "strictly navigable" water. In order to get the logs and lumber that has gone over the chute in the dam down these rapids, it has been necessary for many years to clear out a channel in the center of the stream, and inclose such channel on each side with cribs and timbers, thus making an artificial canal, as it were, in the center of the stream for the purpose of floatage. This wall will have no appreciable effect upon this artificial channel, unless it be to deepen its waters, and thus aid navigation rather than to hinder it. This is the whole tendency of the proof.

It is claimed by the counsel for complainants that the proposed occupation of the river bed by the defendant will be a purpresture, and, therefore, a public nuisance, and that, as such, the legislature, or the city under authority from the legislature, may abate it whether it interferes with navigation or not. A "purpresture" is defined by Chief Justice Cooley in *Attorney-General v. Booming Co.*, 34 Mich., at page 472, as "an inclosure by a private person of a part of that which belongs to, and ought to be open and free to, the enjoyment of the public at large;" and he also holds that an unauthorized inclosure of a part of a water highway is as much a public wrong as that of a land highway. But he also, in the same case, defines the character of the Muskegon river as a navigable stream at the point in controversy in that case, and says: "Neither is it a navigable stream, in the more popular sense of the term, for it is only a small stream, whose value to the public consists in the use which can be made of it for the purpose of floating logs and lumber." Such is the navigability of the Grand river at the place in controversy here. He further says: "The right of floatage is unquestionably a right which the state should guard and protect; but it is a serious mistake to assume that the private appropriation of a part of the bed of the river would necessarily be either a purpresture or a nuisance. The property taken in such a case is not public, but private, property; and the owner of the bank, who also presumably owns to the center of the stream, may maintain trespass or ejectment against the taker. If the owner makes no complaint, the public can have neither right nor occasion for any, provided

the navigable rights are not abridged. If they are, it is not very manifest how this can be a purpresture. The difference between the highway on land, with its definite limits to which the public right extends, whether the whole is used or not, and the highway for floatage in our small streams, where the public rights have no definite limitations of space except as practicability for use and the occasion for use may give various limits, as the seasons and the needs of business and traffic may change, is so plain that the difference between an appropriation in the two cases needs only to be mentioned. It requires neither argument nor illustration. The one is a public grievance of some sort; but the other is no public grievance of any sort, unless the public use is unreasonably abridged or inconvenienced."

The police power of the legislature in this state is not omnipotent. It cannot, under the guise of regulation, destroy property rights arbitrarily and without reason. The legislature can, without doubt, in public harbors, and perhaps in navigable streams, where boats and vessels can be and are used, limit the construction of wharves to the line of navigability; but it is doubtful if such erections could be stopped short of such lines unless some good reason could be shown for such a regulation. *Attorney-General v. Booming Co.*, 34 Mich. 472, 473. And "the extent to which private improvements are compatible with the public use must depend upon circumstances, and must always be a question of fact." *Ryan v. Brown*, 18 Mich. 209. The legislature of Michigan cannot authorize a municipality to make that a purpresture or nuisance which is not so in fact, if, by so doing, the constitutional rights of any citizen in his person or property is destroyed or infringed. *Wreford v. People*, 14 Mich. 41; *Everett v. Marquette*, 53 Mich. 450; 19 N. W. Rep'r, 140; *Frazee's Case*, 63 Mich. 396; 30 N. W. Rep'r, 72; *Robison v. Miner*, 68 Mich. 556; 37 N. W. Rep'r, 21; *People v. Armstrong*, 73 Mich. 288; 41 N. W. Rep'r, 275.

The power of the legislature in the matter of harbor and dock-lines upon streams where the bank owner's title in fee reaches to the bed of the river, subject to the public use for purposes of navigation, came before the supreme court of the United States in *Yates v. Milwaukee*, 10 Wall. 497. Yates built a wharf over the low water in the Milwaukee river the width of his lot, and one

hundred and ninety-six feet in length, to reach navigable water. The legislature of Wisconsin had authorized the common council of Milwaukee to establish, by ordinance, dock and wharf lines on this river, and to restrain and prevent encroachments and obstructions therein, and to cause it to be dredged. The city by ordinance declared this wharf to be an obstruction to navigation and a nuisance, and ordered it abated. Yates refused to abate it. Thereupon the city contracted with a person to remove it, and Yates filed his bill to restrain such removal. There was no evidence to show that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance.

The court, speaking through Mr. Justice Miller, said: "We are of the opinion that the city of Milwaukee cannot, by creating a mere artificial and imaginary dock-line, hundreds of feet away from the navigable part of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantages of the navigable channel by building wharves and docks to it for that purpose." It is also further said that the riparian right in the bed of the stream "is property and valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed. It is a right of which, when once vested, the owner can only be deprived in accordance with the established law, and, if necessary that it be taken for the public good, upon due compensation." See, also, *Norfolk City v. Cooke*, 27 Gratt. 430, where it is held that the soil under water of the riparian proprietor is not a mere license or privilege, but is property — property in the soil up to the line of navigability, though covered with water.

An intending case, and one in point, is *City of Janesville v. Carpenter* (Wis.), 46 N. W. Rep'r, 128. The legislature of Wisconsin in 1887 passed an act "that it shall be unlawful and presumptively injurious \* \* \* to person and property to drive piles," etc., "in Rock river within the limits of the county of Rock, and the doing of such act shall be enjoined at the suit of any resident tax-payer, without proof that any injury \* \* \* has been or will be sustained by reason of such act;" and further provided that such acts might be enjoined at the suit of any one having the use of the water-power of the river in said county,

without other proof than that the act will cause the river to rise or set back to some extent at the place where the water, used to operate his mill or factory, is discharged into the river. This would seem to have been the exercise of the police power of the legislature declaring certain specified things nuisances *per se*. But the Wisconsin supreme court holds that such legislation is void, and in violation of the constitution, in that it deprives the riparian owner of his property in the river without compensation and without due process of law. The court says: "This is the first time that any legislature of any enlightened country has attempted to create an action without any cause of action; to authorize a complaint to be made to a court to enjoin the lawful use and enjoyment of one's own property, without proof that any injury or danger has been or will be caused by reason of such act."

The court holds as follows in regard to the right of the person sought to be enjoined by the city under this act: "That Thomas Lappin, the owner in fee of this ground, has the right to use and enjoy it to the center of the river in any manner not injurious to others, and subject to the public right of navigation, has been too often decided by this court and other courts to be questioned. As a riparian owner of the land adjacent to the water, he owns the bed of the river *usque ad filum aquæ*, subject to the public easement, if it be navigable in fact, and with due regard to the rights of other riparian proprietors. He may construct docks, landing places, piers and wharves out to navigable waters if the river is navigable in fact; and, if it is not so navigable, he may construct any thing he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes." *Jones v. Pettibone*, 2 Wis. 308; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118; *Walker v. Shepardson*, 4 Wis. 486; *Improvement Co. v. Lyons*, 30 Wis. 61; *Delaplaine v. Railroad Co.*, 42 Wis. 214; *Cohn v. Boom Co.*, 47 Wis. 314; 2 N. W. Rep'r. 546; *Boom Co. v. Reilly*, 46 Wis. 237; *Hazeltine v. Case*, 46 Wis. 391; 1 N. W. Rep'r. 66. Subject to these restrictions he has the right to use his land under water the same as above water. It is his private property under the protection of the constitution, and it cannot be taken, or its value lessened or impaired, even for pub-

lic use, "without compensation," or "without due process of law," and it cannot be taken at all for any one's private use. This, in my opinion, is the title also that the defendant Powers holds in the bed of Grand river, opposite his shore line, and his rights are co-extensive with those given by the Wisconsin supreme court to Lappin; and that the law of this state is in complete accord and harmony with that of our sister state of Wisconsin in respect to riparian rights. See especially *Ryan v. Brown*, 18 Mich. 196; *Attorney-General v. Booming Co.*, 34 Mich. 462; *Sterling v. Jackson*, 69 Mich. 510-512; 37 N. W. Rep'r, 845, opinion, Campbell, J.; *Middleton v. Booming Co.*, 27 Mich. 533, and notes; *Watson v. Peters*, 26 Mich. 508, and cases cited in note 1; *Booming Co. v. Jarvis*, 30 Mich. 308; *Maxwell v. Bridge Co.*, 41 Mich. 466; 2 N. W. Rep'r, 639.

I do not pass upon the right of the legislature to empower the city of Grand Rapids to establish dock-lines within the limits of the navigable part of the river, if there is such navigable water, and to prevent any encroachments upon or obstructions within the water so outlined as navigable. It is not necessary to the determination of this case. But outside of the navigable water no dock-line can be drawn, and the property thereby taken for public use, without compensation to or consent of the riparian owners. Nor do I decide that the city may not make and enforce all needful and reasonable rules and regulations as to the public and private use of this river necessary to the public health of said city, or to prohibit any encroachment upon the river bed which will tend to seriously increase the danger of floods and the destruction of property thereby. The city saw fit in its proofs to rest upon the validity of the dock-lines. There is no showing that the building of this wall will be of the least detriment to the public health, or that it will have any tendency to increase the dangers arising from floods. The river is narrower below this wall, and made so by bridges of the city's own construction and maintenance than it will be at any place where the wall will be situated after it has been constructed as proposed by the defendant. The city engineer can see no reason, in his testimony, why the building of this wall will tend either to the creation of overflows, or to increase the floods that sometimes have existed from various causes in high water. I have not space to discuss the



testimony, but it is wholly barren of any showing that this wall, which the defendant is building, and proposes to build, upon his own land, will interfere in the least with the public use of the river, the rights of any other riparian owner in the stream, or damage any public or private interest to any perceptible extent. It may be that such a showing can be made as would entitle the complainant to the relief asked, but it has not seriously been attempted by the proofs, presumably for the reason that the complainant supposed its case was completely made out by the law, by virtue of the legislative act, and the municipal proceedings under it. The decree of the court below must be dismissed, with costs of both courts, but without prejudice to any further action or proceeding, if cause can be shown for it as heretofore pointed out.

Champlain, C. J., did not sit. The other justices concurred.\*

**Municipal corporations — establishment of harbor lines — riparian rights.** — In *Farist Steel Co. v. City of Bridgeport*, 60 Conn. 278; 23 Atl. Rep'r, 561, the right of riparian owners to compensation for the establishment of harbor lines between high and low-water mark is considered by the supreme court of Connecticut. The court sustained the right to compensation, and in their opinion say:

"The first question, therefore, which we shall consider relates to the general right of the owner of lands abutting on navigable waters to damages for the legal establishment of a harbor line over the abutting flats, between high and low-water marks. In Connecticut the public is the owner in fee of the flats adjoining navigable waters up to high-water mark, such title being vested in the public for purposes of navigation and commerce. *Simons v. French*, 25 Conn. 346. The owner of the adjoining uplands has the exclusive privilege of wharfing and erecting stores and piers over and upon such soil, and of using it for any purpose which does not interfere with navigation, and it may be conveyed separately from the adjoining uplands. Over it he has the exclusive right of access to the water, the right to accretions, and generally to reclamations. Because the soil, between high and low-water marks, is held to be *publici juris*, the right of the owner of the adjoining upland in it is termed a 'franchise.' But it is none the less a well-recognized, substantial and valuable right. It constitutes, as the court says in *Simons v. French*, *supra*, speaking of the right of wharfage, like other franchises, a species of property, which like other property is alienable by the owner, and alienable as well before the right has been exercised as it would be after a wharf had been actually erected. It is claimed by the appellee that inasmuch as the fee of the flats is in the state, therefore the state has the undoubted right, by itself or by those to whom it delegates the right,

\* Reported in 50 N. W. Rep'r, 661.

to take and use them for any public purpose without giving compensation therefor, so long, at least, as the upland proprietor has not appropriated them to such uses as he legally may. There are cases which sustain such a claim. On the contrary there are cases which hold that riparian owners upon navigable waters have rights appurtenant to their estates of which they cannot be deprived when once vested, except in accordance with established law, and upon due compensation. This, says Lewis, in his recent work on Eminent Domain, after reviewing the cases, seems the better and sounder rule. It certainly seems more in harmony with our Connecticut decisions that the right of wharfage—perhaps the most valuable franchise attached to the upland—is as much the subject of sale by the owner of the right before it has been exercised as it would be after.”

The court also held in the same case that the taking of lands by inclosing them in harbor lines for the sole purpose of preventing the erection of buildings thereon, which would obstruct the view of a public bridge, is not a public use and, therefore, not a proper exercise of the power of eminent domain.

A contrary view is maintained in some recent decisions of the Washington supreme court. In one of these the plaintiff owned property abutting on Puget sound. He filed a bill to enjoin the defendants from occupying the shore in front of his property, below high-water mark, with certain structures intended for use in trade and commerce. The defendants claimed under a license from the state. The court held in favor of the defendant's right. “The result of our investigation of the authorities,” says the court, “leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate.” *Eisenbach et al. v. Hatfield*, 3 Wash. 236; 26 Pac. Rep'r, 539. This case is followed and the same doctrine affirmed in *Board of Harbor Line Com'rs v. State, ex rel. Yealer*, 2 Wash. 530; 27 Pac. Rep'r, 550. These cases also involve the construction and validity of a provision of the constitution of that state, which, as construed by the court, asserts the absolute and exclusive right of the state to the land below high-water mark, and, therefore, the virtual denial to the riparian owner of any riparian rights whatever.

The subject of riparian rights and harbor lines will be found discussed at length in Lewis on Eminent Domain, §§ 77-84; 1 Dill. Mun. Corp. 108-111.

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### MALLORY V. MALLORY-WHEELER CO.

(Supreme Court of Errors of Connecticut. June 1, 1891.)

1. CORPORATIONS. FIDUCIARY RELATIONS OF DIRECTORS. The directors of a corporation occupy a position of the highest trust and confidence, and the utmost good faith is required in the exercise of the powers conferred upon them. They have no right, under any circumstances, to use their official positions for their own benefit or the benefit of any one except the corporation itself, and consequently they have no authority to represent the corporation

in any transaction in which they are personally interested in obtaining an advantage at the expense of the corporation.

2. **CONTRACT WITH CORPORATION FOR SALARY, WHEN VOIDABLE.** Where three persons, a majority of the directors of a corporation, each being a salaried officer, pass a vote appointing one of their number as the agent of the corporation to make a contract with the others, and then pass another vote appointing one of the latter to make a contract with the first one, continuing in force for a certain time agreements which were about to expire, and by which they were to receive a certain salary, such contracts are voidable by the corporation, as the directors occupy a fiduciary position, and have no authority to represent the corporation in any transaction in which they are personally interested.

3. **RATIFICATION AND ESTOPPEL. EFFECT OF DELAY.** Where such contracts were made in October, 1887, and there was nothing to show that the stockholders had any knowledge of them until the day of their next meeting, which was in May, 1888, and no other meeting was held until May, 1889, when new directors were chosen, who promptly repudiated them, the delay was not such as to preclude the corporation from availing itself of the original invalidity of the contracts.

**A** PPEAL from superior court, New Haven county, F. B. Hall, judge. This was an action by Frederick B. Mallory against the Mallory-Wheeler Company to recover for salary. From a judgment for defendant plaintiff appeals. Affirmed.

*H. Stoddard* and *J. W. Bristol* for appellant. *J. W. Alling* for appellee.

**ANDREWS, C. J.** The plaintiff in this case claims to recover the sum of \$3,294.44, the balance of salary which he says is due to him for services rendered as chief manager and director of the business of the defendant from the 1st day of January, 1889, to the 1st day of January, 1890. The defendant is a manufacturing corporation, organized under a charter from the general assembly approved March 25, 1884, and an amendment thereto accepted on the 8th day of April, 1885. The corporation succeeded to the business, which, prior to said dates, had been carried on by a partnership of the name of Mallory, Wheeler & Co. That partnership was by its articles of agreement to continue only to the 31st day of December, 1887. The same persons who had been partners in the copartnership became stockholders in the corporation. In connection with the change from the partnership to the corporation a contract was made between the present plaintiff and the

corporation, as follows: "Whereas, it is the desire of all parties in interest that Frederick B. Mallory shall continue to act as chief manager and director of the Mallory, Wheeler & Company Corporation in the same manner that he has heretofore acted, and with the same powers that he has heretofore exercised in reference to the business of the copartnership of Mallory, Wheeler & Company: Now, therefore, it is mutually agreed between the said Frederick on the one hand and the said corporation, acting herein by its agent, William H. Andrews, thereto duly authorized, on the other part, as follows, to-wit: The said Frederick, on his part, agrees with said corporation that he will act as chief manager and director of the business of said corporation, and will devote his time and services thereto for the term of three and three-quarter years at a salary and for the compensation of \$6,000 per annum. And the said corporation on its part hereby agrees with the said Frederick to employ him as chief manager and director of the business of said corporation, with the powers heretofore exercised by him in reference to the management personally of the business of Mallory, Wheeler & Company, for the term of three and three-quarter years as aforesaid, at a salary of \$6,000 per annum. In witness whereof said parties have set their names and seals, and to a duplicate of like tenor and date, this 19th day of April, A. D. 1884. The Mallory, Wheeler & Co. Corporation, by its agent, William H. Andrews. Frederick B. Mallory." A contract of the same date and tenor was made between the corporation and William H. Andrews that he should be the assistant treasurer of the corporation for said term of three and three-quarter years, at a salary of \$3,500 per annum, and a like contract with Rukard B. Mallory, a brother of the plaintiff, to be the vice-president for the same term, at a salary of \$2,500 per annum. These were the only salaried officers in or about the management of the business of the defendant.

From the organization of the corporation in April, 1884, until May 17, 1889, the plaintiff was one of its directors, was its president, and was the chief manager of its business, receiving the salary named in the contract. The said Rukard B. Mallory and the said William H. Andrews had also been directors, and had been, respectively, in the offices, and had received the salaries above named. There were five directors in all. The others

were John S. Davenport and Franklin B. Dexter. At a meeting of the directors of the corporation holden on the 29th day of October, 1887, a vote was passed in these words: "Voted that William H. Andrews be appointed the agent of the company to execute an agreement with Frederick B. Mallory, extending and keeping in force the corporation's contract with him as chief manager and director of the business of the Mallory-Wheeler Company, for a further term of five years from January 1, 1888." It was also voted "that F. B. Mallory be appointed the agent of this company to execute an agreement with Rukard B. Mallory, extending and keeping in force the corporation's contract with him as vice-president of the Mallory-Wheeler Company, for a further term of five years from January 1, 1888." It was also voted "that F. B. Mallory be appointed the agent of this company to execute an agreement with William H. Andrews extending and keeping in force the corporation's contract with him as assistant treasurer of the business of the Mallory-Wheeler Company for a further term of five years from January 1, 1888." Pursuant to the votes so passed a contract was made with the plaintiff on the 31st day of October, 1887, as follows: "In accordance with a vote of the directors of the Mallory-Wheeler Company of October 29, 1887, it is hereby mutually agreed between Frederick B. Mallory on the one hand, and the said company acting herein by William H. Andrews, its agent thereto duly authorized, on the other, that the corporation's contract with said Frederick B. Mallory as chief manager and director be extended and kept in force for a further term of five years from January 1, 1888. The Mallory-Wheeler Company, by its agent, William H. Andrews. Frederick B. Mallory."

A renewal of the contract with the said Rukard B. Mallory and with the said William H. Andrews was made at about the same date, renewing the contract of each for the further term of five years from the 1st day of January, 1888. At the annual meeting of the corporation holden in May, 1889, the stockholders elected a new board of directors. It is alleged, and admitted by a demurrer, that the new board of directors was chosen by a majority of the stockholders with the intent and design to disregard said contracts of renewal; and on the 14th day of May, 1889, the new board of directors passed the following vote:

"Resolved, that in the opinion of this board the so called renewal of October 29, 1887, of the contract made with F. B. Mallory by William H. Andrews, as agent of this company, is void and of no binding value, and that the said F. B. Mallory no longer be permitted to act as manager or exercise any other rights than appertain to any stockholder; and the secretary is hereby instructed to send him forthwith a copy of this resolution." Since the passing of this resolution, the plaintiff has not performed any of the duties of said office of chief manager, though, as he avers, he has at all times been willing and has offered so to do. It is the salary from the said 17th day of May to the end of the year which he claims in this suit.

These are the controlling facts as set forth in the record. The questions presented are whether or not the contract of renewal made with the plaintiff on the 31st day of October, 1887, was void; and, if not void, was it voidable at the option of the corporation? The first one is not very important in this case, because, if it was voidable only, it has been avoided in an unequivocal manner by the action of the board of new directors, acting by the direction of the stockholders. The contract of renewal must, of course, be considered in connection with the vote of the directors appointing an agent to make the renewal. The contract depends on that vote. The vote appointing the agent to make the contract, and the making of the contract, are the successive steps in one transaction. The latter cannot be valid if the former is invalid. That vote consists of three parts; and while in the present inquiry only, the part which appointed Mr. Andrews to be the agent of the corporation to make the renewal with the plaintiff, is directly involved, it is impossible to consider that part by itself. The vote as it is set forth in the record purports to be one vote, and not three separate votes. It seems to have been passed as a whole, and as a single expression of the will. But whether this action of the directors be regarded as one vote or as three separate votes, can make no real difference. If there were three votes, they were all passed at the same meeting. They were related to each other, and all had reference to one common object — the continuing the same persons in the management of the business of the corporation who were then managing it; so that the three separate votes, or the three parts of one vote, must all

be taken together in order to ascertain what influences operated to procure the passage of any one of them, and to determine their effect when passed. It is not necessary to suppose that there was any formal agreement beforehand between the three directors interested that these three votes should all be passed.

It is altogether likely that there was no such agreement. But the votes were all before the directors' meeting at the same time. These three directors were all present. They were each interested in the common object to be attained by their passage. No one of these votes could be passed without the affirmative voice of one of these directors. The three votes were all passed; and as to each of these directors the vote was speedily followed by a contract of renewal. In the result, the affirmative action of any one of them became the affirmative action of them all. The case, then, in its full outline, is one where a majority of the directors, each being a salaried officer of the corporation, and together being all its salaried officers, appointed one of themselves to be the agent of the corporation to make a contract with one or more of the others, and then one of the latter to be the agent of the corporation to make a contract with the one named as the agent in the first instance, continuing in force agreements by which they were to remain in the control of all the business of the corporation, and in receipt of all the salaries paid by the corporation. It amounted to a stipulation on the part of the defendants that in no contingency should there be any change of the management of the corporation or a reduction of its expenses for the term covered by the renewal contract. Such contracts have been repeatedly declared void as being opposed to public policy. *Wardell v. Railroad Co.*, 103 U. S. 651; *Woodstock Iron Co. v. Richmond, etc., Extension Co.*, 129 U. S. 643; 9 Sup. Ct. Rep'r, 402; *West v. Camden*, 135 U. S. 507; 10 Sup. Ct. Rep'r, 838; *Guernsey v. Cook*, 120 Mass. 501; *Noel v. Drake*, 28 Kans. 265.

We fully recognize the authority of these decisions. But the question of public policy is not necessarily involved in the present case. In a narrower view this case is one also in which the plaintiff has made use of his position as a director in the defendant corporation to secure for himself an advantageous contract for a salary. So the question becomes, is such a contract void, and, if not, is it voidable? This question must be answered according

to the equitable doctrine which governs and controls the conduct of a trustee or other fiduciary toward his *cestui que trust* or beneficiary. It is a thoroughly well-settled equitable rule that any one acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest. This rule is strict in its requirements and in its operation. It extends to all transactions where the individual's personal interest may be brought into conflict with his acts in the fiduciary capacity, and it works independently of the question whether there was fraud or whether there was good intention. Where the possibility of such a conflict exists there is the danger intended to be guarded against by the absoluteness of the rule. The underlying thought is that an agent or other fiduciary should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or be brought into a situation where his own personal interests conflict with the interests of his principal and with the duties he owes to his principal. The rule applies alike to agents, partners, guardians, executors and administrators, and directors and managing officers of corporations, as well as to technical trustees. It is a violation of his duty for any trustee or director acting in his fiduciary capacity to enter into any contract with himself connected with the trust or its management. Such a contract is voidable, and may be set aside at the suit of the beneficiary. This rule has been recognized and enforced in a very great number of cases, which are brought together in the notes in 2 Pom. Eq. Jur., under sections 958, 959, 1050, 1077, and in Story Eq. Jur., §§ 522, 1211. See, also, *Banks v. Judah*, 8 Conn. 145; *Caldwell v. Sigourney*, 19 Conn. 37; *Candee v. Skinner*, 40 Conn. 464; *Clement's Appeal*, 49 Conn. 520; *Potter's Appeal*, 56 Conn. 1; 12 Atl. Rep'r, 513; *Disbrow v. Secor*, 58 Conn. 35; 18 Atl. Rep'r, 981; *Michoud v. Girod*, 4 How. 503; *Gardner v. Ogden*, 22 N. Y. 327. The relation between the directors of a corporation and the company itself is in most respects a fiduciary relation. While not trustees in a technical sense, they are often called such in practice. They are agents invested with wide discretionary powers in the management of the company's business; and whenever an agent is invested with authority to use any discretion in the exercise of the powers conferred upon him, it is an implied



condition that this discretion shall be used in good faith for the benefit of the principal, according to the true purpose of the agent's appointment. To this extent every agency which is not a purely ministerial one involves a fiduciary relation between the parties. It is manifest, therefore, that the directors of a corporation occupy a position of the highest trust and confidence, and that the utmost good faith is required in the exercise of the powers conferred upon them. They have no right, under any circumstances, to use their official positions for their own benefit or the benefit of any one except the corporation itself. It is for this reason that the directors have no authority to represent the corporation in any transaction in which they are personally interested in obtaining an advantage at the expense of the company. *Mor. Priv. Corp.*, §§ 516, 517; *Ang. & A. Corp.*, § 233, and note. "The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature toward their principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. \* \* \*

It is true that the questions have generally arisen on agreements for the purchases or leases of lands, and not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party, and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling or letting land." *Railway Co. v. Blaikie*, 1 Macq. 462, by Lord Cranworth, chancellor. In *Re Coalbrook Railway Co.*, 18 Beav. 339, Sir John Romilly, the master of the rolls, said: "The directors of a public company are trustees for the stockholders, and their private in-

terests must yield to their public duty whenever they are conflicting. The court would hold that as long as he filled the office of trustee and director he could not enter into or sanction any transaction by means of which he gained a personal advantage to himself." And again, in *Railway Co. v. Sir William Magnay*, 25 Beav. 589, he said: "The directors of a company are trustees, and they have attached to them for the benefit of the shareholders all the liability and duties which attach to a trustee and agent. If, therefore, a director enter into a contract for the company, he can derive no personal benefit from it." *Flanagan v. Railway Co.*, L. R., 7 Eq. 116. Other English authorities may be found collated in the notes to the case of *Fox v. Mackreth*, 1 White & T. Lead. Cas. Eq. (2d Am. ed.) 148.

The courts in this country, equally with the courts of England, have been clear and emphatic in declaring this rule to be applicable to the directors of a corporation. In *Coal Co. v. Sherman*, 30 Barb. 553, the court, after citing the case of *Railway Co. v. Blaikie*, supra, says: "Nay, the rule as applicable to managers of corporations should in no particular be relaxed. Those who assume the position of directors and trustees assume also the obligations which the law imposes on such a relation. The stockholders confide to their integrity, to their faithfulness, and to their watchfulness the protection of their interests. This duty they have assumed, this the law imposes on them, and this those for whom they act have a right to expect. The principals are not present to watch over their own interests; they cannot speak in their own behalf; they must trust to the fidelity of their agents. If they discharge these important duties and trusts faithfully, the law interposes its shield and defense; if they depart from the line of their duty, and waste or take themselves, instead of protecting, the property and interests confided to them, the law on the application of those wronged or despoiled promptly steps in to apply the correction, and restores to the injured what has been lost by the unfaithfulness of the agent." In *Duncomb v. Railroad Co.*, 84 N. Y. 190, 198, the court of appeals said: "It is not intended to deny or question the rule that whether a director of a corporation is to be called a 'trustee' or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and

general interests of the corporation, and not for his own private interests, and that he falls, therefore, within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal on his own behalf in respect to any matter involving such confidence. Nor is it at all questioned that in such cases the right of the beneficiary, or those claiming through him, to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently or in good faith and honestly, but is founded upon the known weakness of human nature and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee in his fiduciary character." See, also, *Barnes v. Brown*, 80 N. Y. 535; *Blake v. Railroad Co.*, 56 N. Y. 485; *Hoyle v. Railroad Co.*, 54 N. Y. 314; *Barr v. Railroad Co.*, 125 N. Y. 263; 26 N. E. Rep'r, 145; *Railroad Co. v. Poor*, 59 Me. 277; *Railroad Co. v. Dewey*, 14 Mich. 477; *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Simons v. Oil Co.*, 61 Penn. St. 202; *Oil Co. v. Marbury*, 91 U. S. 587. It may be fairly gathered from the authorities cited that the rule we are now considering does not operate *ipso vire* to avoid every transaction of a trustee made with his beneficiary in which he is interested. It is generally limited in its operation to rendering them voidable at the election of the party whose interests are concerned in the question of their affirmation or disaffirmance. If, therefore, nothing is done in avoidance, the transaction remains. 2 Pom. Eq. Jur., § 1077; *Duncomb v. Railroad Co.*, 84 N. Y. 190, 198. Much more if the transaction has been ratified by that party. *Barr v. Railroad Co.*, 125 N. Y. 275; 26 N. E. Rep'r, 145.

The plaintiff contends that the contract upon which the action is brought had been ratified by the defendant, and that the pretended vote of avoidance was itself void. Such ratification is claimed to be established by the conduct of the defendant. The averment is that "at a meeting of the defendant, held in May, 1888, at which all the stock was represented, all the stockholders being fully advised that the contract in question was made, and of its terms, no action was taken at that time, nor at any subsequent stockholders' meeting, to disannul said contract, or tending to

repudiate the same, and the said contract was thereby acquiesced in by said stockholders' meeting." The contract of renewal was made on the 31st day of October, 1837. This stockholders' meeting was held in May, 1838. There is nothing to indicate, or even to suggest, that the stockholders had any knowledge of that contract until the day of that meeting. No other meeting of the stockholders is shown to have been had until the annual meeting in May, 1889, when the new board of directors was chosen, who promptly repudiated it. Instead of delay it would seem that the stockholders acted in disaffirmance of the contract on the very first opportunity when it was possible for them to act. No affirmative act of ratification on the part of the defendant is alleged to have been done. Ratification ordinarily requires some positive assertive act. *Howell v. McCrie*, 36 Kans. 636; 14 Pac. Rep'r, 257. In order that acquiescence alone should become ratification, the delay must be so long continued that it can be accounted for only on the theory that there has been some affirmative act. *Town of Derby v. Alling*, 40 Conn. 410; *Evans v. Smallcombe*, L. R., 3 H. L. 249. The distinction is perhaps of no consequence in this case. The real claim is that the defendant, by long delay, has lost all right to avail itself of the original invalidity in the plaintiff's contract. Whether it is called "ratification" or "waiver" or "acquiescence" or "estoppel" makes no very great difference. But before such right can be lost in either of the ways mentioned certain conditions must exist. The delay must have been unreasonable. *Lewin Trusts* (Am. ed.), side pp. 495, 496; *Sherman v. Fitch*, 98 Mass. 64; *Indianapolis Rolling-Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256; 7 Sup. Ct. Rep'r, 542. The stockholders must have had an opportunity to act, and to act with perfect freedom. *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Hoxie v. Insurance Co.*, 32 Conn. 21, 40; *Allore v. Jewell*, 94 U. S. 512; *De Bussche v. Alt*, 8 Ch. Div. 286; *Kempson v. Ashbee*, 10 Ch. App. 15; *Sayers v. Collyer*, 28 Ch. Div. 103. And have been fully advised of all the material facts in the case. *Gould v. Blodgett*, 61 N. H. 115; *Kelly v. Railroad Co.*, 141 Mass. 496; 6 N. E. Rep'r, 745; *Phosphate of Lime Co. v. Green*, L. R., 7 C. P. 43; *Lewin Trusts* (Am. ed.), side p. 597; *Association v. Coleman*, L. R., 6 Ch. App. 558; *Wire Co. v. Martin*, 1 Ch. Div. 580; *Oil Co. v. Marbury*, 91 U. S. 537. The

allegations of the plaintiff's pleading in this behalf fall far short of showing these conditions to exist in this case. There is no error in the judgment appealed from. The other judges concurred.\*

**Corporations — contract with directors voidable — ratification.**— In order to construct a connecting line for a railway company, a new company was organized, some of the directors and incorporators being directors of the old company. The new company made an agreement for the construction of its road, whereby it was to issue to the contractor \$1,000,000 of seven percent bonds, and \$500,000 capital stock, being all the bonds and stock of the company. The contractor was a mere figure-head representing a syndicate of the directors, and assigned both the securities and the contract to them. The actual cost of constructing the road was \$850,000, and after completion it was leased to the old company, which agreed to pay a rental equal to thirty per cent of the new road's gross earnings, and guaranteed that such sum should never be less than \$105,000 per annum, or seven per cent on the total issue of bonds and stocks. Held, that, while the lease was made in pursuance of a corrupt scheme to impose upon the old company an obligation for the benefit of some of its own directors, yet it was merely voidable, and not void. *Barr v. New York, etc., R. Co.*, 125 N. Y. 263; 26 N. E. Rep'r, 145. In the same case facts are reviewed which are held to amount to a ratification. On the subject of contracts with directors, see *Richardson's Executor v. Green*, 1 Am. R. R. & Corp. Rep. 241; *Gamble v. Queens County Water Co.*, 3 Am. R. R. & Corp. Rep. 290.

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### BANK OF LITTLE ROCK v. MCCARTHY ET AL.

(Supreme Court of Arkansas, Feb. 20, 1892.)

1. **CORPORATIONS. MEETINGS OF DIRECTORS. NOTICE.** Where there is no provision in the statutes, or in the by-laws of a corporation, for the holding of regular or special meetings of the directors, or for giving notice of meetings, there cannot be a legal meeting of the directors without personal notice to each director.

2. The code (Mansf. Dig., § 5206) providing for notice by leaving a copy thereof at the usual place of abode of the person to be served applies only to notices required by the code and not to notices to directors of corporations, and a meeting held upon such notice to an absent director is invalid.

3. **WHEN ACTION OF DIRECTORS VALID THOUGH MEETING NOT DULY CONVENED.** The action of directors at a meeting held without due notice to those not attending, will be invalid, unless notice was impracticable and there existed an emergency and reasonable necessity for the action taken.

4. **MORTGAGE OF THE CORPORATE PROPERTY. AUTHORITY. VALIDITY.** A mortgage of all the property of a corporation to secure an existing debt

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\* Reported in 23 Atl. Rep'r, 708.

and future advances, must be duly authorized by the board of directors or it will be invalid.

5. When such a mortgage was ordered at a special meeting attended by four out of five directors, and no notice of the meeting was served upon the one who was absent, and it did not appear that any sufficient emergency or necessity existed for making the mortgage, it was held invalid as to the existing indebtedness, no money having been advanced after the making of the mortgage.

**A** PPEAL from circuit court, Hot Springs county, James B. Wood, judge. Action for receiver by one Trump, a director, against the Bratt Lumber Company and its creditors, McCarthy & Joyce and the Bank of Little Rock. Judgment for McCarthy & Joyce. The Bank of Little Rock appeals. Reversed.

*W. S. McCain* and *U. M. & G. B. Rose* for appellant. *W. L. Terry* and *Sanders & Watkins* for appellees.

HEMINGWAY, J. The Bratt Lumber Company was a corporation organized under the laws of this state to conduct a milling and lumber business. Its stockholders were J. A. Bratt, J. H. Trump, W. H. Crawford, Leonard Bratt and C. B. Field. The board of directors was composed of the same persons, with J. A. Bratt as president, and Field secretary and treasurer. About the 1st day of August, 1889, the company owed McCarthy & Joyce about \$25,000, and the Bank of Little Rock the same sum. It was in debt to its employes and other persons in amounts aggregating about \$6,500. The Bratts and Trump live at Malverne, the principal place of business of the company, Crawford in Indiana, and Field in the city of Little Rock, where he had an established residence and a place of business. At that time Field left the state to be absent for a while, stating to Bratt, the president, that he would return in a few days, and provide means to pay the pressing debts of the company. Field not returning in time to provide for such demands, Bratt inquired of the person in charge of his office in Little Rock to learn where he was, and was informed that he was stopping at the Tremont House, in the city of Chicago. Bratt then went to Kansas City, where the company made sales of lumber, for the purpose of collecting the proceeds of such sales, to meet the company's liabilities. Finding that the sales

were confused with sales made by other companies of which Field was an officer, and that he could collect nothing on that account, he proceeded to Chicago for the purpose of seeing Field. On his arrival he found that Field had left Chicago, and, being unable to learn his whereabouts, Bratt returned to Little Rock without having obtained the desired funds. He then appealed to McCarthy & Joyce to lend him the amount needed. They declined to do so unless he would secure their old debt, as well as the sum to be loaned, by a mortgage on the company's property, but offered to lend him \$10,000 upon condition that such security be given. Bratt agreed to give the mortgage as requested, if arrangements for its execution could be made. After a conference with McCarthy & Joyce and their attorney, it was agreed that Bratt should call a meeting of the board of directors, for the purpose of considering whether the company should mortgage its property to them for the purpose of securing their past indebtedness and a loan to be made of \$10,000. Notices of the meeting were prepared, and served on all the directors, except Field. Bratt again inquired at Field's office to learn where he was, and was told that, if he was not in Chicago, the person in charge of the office did not know where he was. Accordingly, on the 29th of August, 1889, Bratt went with a notice of the meeting to Field's residence, and, finding no one there, inserted it between the door and the casing, and thus left it. Field's family were then absent from the city, and the residence was unoccupied, except by a man who slept there. The notice left at his house was not received by him. On the 31st of August a meeting of the directors was held, in pursuance of the notice, all the members being present except Field, and an order was made by a vote of three to one in favor of making the mortgage to McCarthy & Joyce. In pursuance thereof a mortgage was shortly executed, covering about all of the company's assets, for the purpose of securing the existing debt to McCarthy & Joyce, and also the sum of \$10,000 to be advanced by them. On the same day Trump, the dissentient director, filed the complaint in this case, alleging the indebtedness to McCarthy & Joyce and to the bank, as well as the execution of the mortgage; and that the affairs of the company were being extravagantly and wastefully conducted, and asking that the court appoint a receiver to take charge of its assets and conduct

its business. The company, the bank and McCarthy & Joyce were made defendants, and upon an application in vacation the chancellor granted the application for a receiver. McCarthy and Joyce filed an answer and cross-bill, the material feature of which was a prayer for the foreclosure of their mortgage. The bank also filed an answer and cross-bill, the material features of which were allegations that the mortgage to McCarthy & Joyce was void for the reason, among others, that the meeting at which it was authorized was not a lawful meeting of the board, Field having no notice thereof, and not being present, and a prayer that the assets of the company be ratably distributed among its creditors. The assets were by consent of all parties, converted into money, which was to be held in lieu thereof, subject to the determination of this cause. The cause came on to be finally heard upon the pleadings and proofs, and the court dismissed the cross-bill of the bank, and entered a decree in accordance with the prayer of McCarthy and Joyce. The bank appealed.

The assets were sold for \$25,000, in round numbers, and as the debts more than doubled that sum, it is evident that the company was insolvent. There was nothing in the articles or by-laws of the company fixing the time for regular meetings of the board of directors, and no provision for calling special meetings. McCarthy & Joyce advanced nothing upon the \$10,000 loan provided for in the mortgage, and claim under the mortgage a security only for the past debt. It does not appear that the board of directors ever attempted to hold a meeting after the day when the mortgage was executed.

The two questions which we have deemed it necessary to consider are — *First*, was it necessary to the validity of the directors' meeting that Field should have notice thereof? and, if so, *second*, was he notified? Counsel have argued other questions with ability and learning which merit praise and commendation. But, however interesting we might find the field to which we are invited, the demands that a crowded docket asserts upon our time forbid that we follow them further than is necessary to dispose of this case. We dismiss, therefore, the other matters argued, and proceed to the consideration of the questions stated.

The statute provides that the stock, property, affairs and busi-



ness of business corporations shall be managed by not less than three directors (Mansf. Dig., §§ 964, 969); and, further, that a majority of the directors convened according to the by-laws shall constitute a quorum for the transaction of business. In the case of *Simon v. Association*, 54 Ark. 58; 14 S. W. Rep'r, 1191, the validity of a general assignment authorized by a majority of the directors, at a meeting of which the absent directors had no notice, was considered, and we held that the statute authorized a majority to act only at a meeting legally convened; and that it was essential to a legal meeting that it be called in accordance with the by-laws or rules of the corporation, or upon due and legal notice given to each of the members. There was no contention that notice could not have been served on each member, and no expression as to the law, where that was a fact. Subsequent investigation has not altered our views as then expressed, but we are convinced that they are in a line with the authority of text-writers and adjudged cases. If the rule were otherwise, the rights and interests of minority holders would be liable to great abuse. Even majorities might suffer, for, by absence of some of their number, the minority might become the majority, hold a meeting without notice to the absentees, and change the entire course or policy of the business, or do acts destructive to its prosperity or future existence. Such abuse of corporate power is not unknown to the history of corporations, and its evidence is found in the records of the courts. Rules intended to check or prevent it should be rigidly observed, except where reason requires that they be relaxed. The wisdom of the rule, and the dangers incident to any other, are very clearly stated by Judge Brewer in the case of *Railway Co. v. Commissioners*, 16 Kans. 309, where he shows that, if any other rule prevailed, it would be possible, with a board composed of twelve members, for four directors to convene a meeting of seven by giving notice to three, and withholding it from five others, and to bind the corporation to acts condemned by eight. That case called for no expression as to the law in case of emergency, where notice to any director was impracticable, and contains no discussion of such cases, but there is an intimation that the rule might admit exceptions in such cases. That such cases may arise as will justify and require exceptions to be made is a conclusion to which reflection inevitably leads. In

fact, it is conceded by the learned counsel for the appellant "that a director cannot put a stop to corporate business by simply leaving its jurisdiction;" and that "if, after a reasonable search, the parties are unable to find him, the remaining directors may attend to the necessary affairs." This indicates that the exception arises upon a concurrence of three conditions—*First*, the impracticability of notice; *second*, the existence of an emergency for action; and, *third*, a reasonable necessity for the action taken. Without committing the court to a full approval of this form of stating the exception, we may say that it seems to be substantially correct. Where notice is practicable, it must be given; it can be dispensed with, when impracticable, only to meet an emergency; and the action relied upon must appear reasonably necessary to the welfare of the corporation. If the act is merely proper but not necessary, or if it appear that it may become necessary, but the necessity is not present, the rule should not yield; for in such cases notice may become practicable, and the presence of the absent director secured, before the necessity arises or the emergency is present. Such we consider the rule deducible from the case of *Chase v. Tuttle*, 55 Conn. 455; 12 Atl. Rep'r, 874, relied upon by the appellee; for it had been held, in earlier decisions of that court, that a meeting attended by a majority of the directors of which the minority had no notice, was not lawful, and it does not appear that there was any intention to overrule these decisions. *Stow v. Wyse*, 7 Conn. 214. The learned judge who delivered the opinion in that case says that "the exigency demanded immediate action to save the property and to save expense," and the action of the meeting was upheld upon the ground that power must be accorded the company to protect itself. The case of *Sugar Refining Co. v. Francklyn*, 8 Ry. & Corp. Law J. 91, is not before us; but as quoted in *Beach Priv. Corp.*, p. 473, it does not seem to go as far as the last case. It is there said that a meeting to borrow money could not be held without notice to all the directors, even where some of them were in foreign countries; but a meeting to perfect debentures previously given was justified, because the action came within the ordinary business transacted by the company. We cannot say with confidence, without an examination of the case, what was decided; but it seems that the act was regarded as within the ordinary line of

the company's business, and it may be that it was considered to be such as the managing officers of the company were authorized to do without express authority from a board meeting. The other cases cited by appellee seem to hold that if a majority attend the meeting notice to the minority is unnecessary. *Edgerly v. Emerson*, 23 N. H. 569; *Bank v. Flour Co.*, 41 Ohio St. 558. They are cited by the text-writers as against the current of authority. *Beach Priv. Corp.*, § 279n. ; 1 *Mor. Priv. Corp.*, § 532, note 1. We are of the same opinion, and, as they conflict with the rule announced in former decisions of this court, we cannot follow them. *School Dist. v. Bennett*, 52 Ark. 511; 13 S. W. Rep'r, 132; *Simon v. Association*, 54 Ark. 58; 14 S. W. Rep'r, 1101; *Railway Co. v. Commissioners*, 16 Kans. 309; *Baldwin v. Canfield*, 26 Minn. 43; 1 N. W. Rep'r, 261; *Harding v. Vandewater*, 40 Cal. 77; *Insurance Co. v. Holmes*, 68 Mo. 601; *Stevens v. Society*, 12 Vt. 688; *Gordon v. Preston*, 1 Watta, 385; *Jackson v. Hampden*, 16 Me. 186; *Farwell v. Copper Works*, 8 Fed. Rep'r, 66; *State v. Ferguson*, 31 N. J. Law, 107; *Pike Co. v. Rowland*, 94 Penn. St. 238; *Cronin v. Gore*, 38 Mich. 383.

It is next insisted that the making of a mortgage is an ordinary business act, and, therefore, may be authorized at a meeting of the majority of the directors, without notice to the minority. We do not deem it necessary to enter into a discussion as to what are ordinary and what extraordinary acts of a corporation. If by ordinary acts is meant such as may be done by the managing officers without authority from a board meeting, we agree that they may be ordered at a meeting of the majority without notice to the minority; but, if such acts are intended as can be done only under authority from a board meeting, we cannot accept the principle as correct. For whatever requires the sanction of a meeting must be authorized by a lawful meeting, for the directors can act as a board at no other. No managing officer claimed the authority to execute the mortgage in this case, and none is shown to have existed, and it is unnecessary for us to consider whether the making of a mortgage covering the bulk of the assets comes within the power usually conferred on a general manager. If notice can be omitted only where it is impracticable to give it, and an emergency demands the immediate doing of the act to be

authorized, the question is, was the meeting relied upon in this case lawful without notice to Field? The act incumbered the bulk of the company's assets to secure a past debt, and also a contemplated loan, which was never made. Was it necessary that the company do that act for its protection? The question carries the answer. If we concede that it was necessary to procure money in order to conduct the corporate business, no necessity appears for incumbering its assets to secure the existing debt. It is not shown that efforts were made to borrow the requisite amount from other persons, and for aught that appears, if they had been made, it could have been borrowed. If it could, there was no necessity to make the mortgage to secure the old debt. If it was necessary to secure the old debt in order to borrow the sum needed, that should have been established; for, as the mortgagees seek to bring themselves within the exception to the rule, the burden is upon them to prove the facts that justify an exception. Finding no exigency that demanded the making of the mortgage to secure the old debt, we are of opinion that a meeting to authorize it could not be held without notice to Field. There is no ground to contend that notice to him was unnecessary because he had abandoned the office, for every thing indicated that his absence was temporary, and he in fact returned the next day.

Was the notice left at his usual place of residence, at a time when he and his family were absent to remain until after the time fixed for the meeting, notice to him? Counsel insist that it constituted notice, and to sustain their position cite us to section 5206, Mansfield's Digest; but that section has reference to notices mentioned in the code, and as notices to directors of business corporations are not included in such mention we think the section inapplicable. The law provides for no constructive notice in such cases, and in the absence of such provision, notice must be personal. Such seems to be the rule established by the authorities. *Beach Priv. Corp.*, § 281; *Stow v. Wyse*, 18 Am. Dec. 99, and note, 102, 103; *Covert v. Rogers*, 38 Mich. 363; 1 *Wat. Corp.*, § 63, p. 205; 1 *Mor. Priv. Corp.*, § 531; *Stevens v. Society*, 12 Vt. 688; *Harding v. Vandewater*, 40 Cal. 77. There are statements in text-books and adjudged cases to the effect that, where the director is absent, notice may be left at his usual

place of abode ; but they either grow out of the provisions of statutes or by-laws providing for such notice, or are found in cases where the manner of giving notice was not involved, only the question of the necessity for notice. Under the first head may be cited 1 Dill. Mun. Corp., § 263, and *Lord v. City of Anoka*, 36 Minn. 176 ; 30 N. W. Rep'r, 550 ; and under the second, 1 Wat. Corp., p. 206, and *Jackson v. Hampden*, 20 Me. 37. There being nothing in our statutes or in the by-laws or regulations of the corporation providing for any other than personal notice, we think none other would answer. As a notice to Field was necessary to authorize a meeting, and as none was given, we think it was not a lawful meeting, and the mortgage was not the act of the corporation. *McCarthy & Joyce* were not entitled, therefore, to all the money arising from the sale, but the same should have been distributed among the creditors of the corporation in accordance with law. Judgment reversed, and cause remanded for proceedings in accordance with law.\*

#### MEETINGS OF DIRECTORS—NOTICE OF MEETING.

1. **Necessity of notice—stated and special meetings.**—The rule is substantially universal, that a board of directors of a corporation can only act in a meeting duly convened, and that the action of a majority, when the assent of each is separately obtained, or when given in a meeting not duly convened, is invalid and not binding upon the corporation. *Simon v. Sevier Assn.*, 54 Ark. 58 ; *Stow v. Wyse*, 7 Conn. 214 ; *Herrington v. District Township of Liston*, 47 Iowa, 11 ; *Baldwin v. Canfield*, 26 Minn. 43 ; *Dey v. Mayor, etc., of Jersey City*, 19 N. J. Eq. 412 ; *Johnston v. Jones*, 23 N. J. Eq. 216 ; *Schumm v. Seymour*, 24 N. J. Eq. 143 ; *Cammeyer v. United German Lutheran Churches*, 2 Sand. Ch. 186 ; *Shorts v. Unauetz*, 3 W. & S. 45 ; *Commonwealth v. Cullen*, 13 Penn. St. 133 ; *Stoystown, etc., Turnpike Co. v. Craver*, 45 Penn. St. 886 ; *D'Arcy v. Tamoor, etc., R. Co., L. R.*, 2 Exch. 158. The only cases not in harmony with this rule are *Edgerly v. Emerson*, 23 N. H. 555, and *Sampson v. Bowdoinham Steam Mill Corp.*, 36 Me. 78.

It is also a general rule that, in the absence of any statute or by-law to the contrary, a majority constitute a quorum and that, where a quorum is duly convened, the assent of a majority of the quorum is sufficient for the validity of any act. *Paola & Fall River R. Co. v. Comrs. of Anderson Co.*, 16 Kans. 302 ; *Scott v. Paulen*, 15 Kans. 162 ; *Jackson v. Hampden*, 16 Me. 184 ; *Jackson v. Hampden*, 20 Me. 37 ; *Wiggin v. Freewill Baptist Church*, 8 Met. 301 ; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205 ; *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402 ; *Miller v. English*, 21 N. J. Law, 317 ; *Doernbecher v. Columbia City Lumber Co. (Oreg.)*, 28 Pac. Rep'r, 890.

In view of these general rules it is important to know what is essential to

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\* Reported in 18 S. W. Rep'r, 750.

constitute a valid meeting of a board of directors, or, in other words, when a quorum can be considered as "duly convened." We propose in this connection to consider this question with reference to the matter of notice only. In reference to notice of meetings, the same rules apply to boards of directors as to meetings of stockholders and meetings of public bodies, such as city councils, county boards, school boards and the like. *Field Corps.*, § 228; *Pike Co. v. Rowland*, 94 Penn. St. 238.

If the statute or by-laws provide for regular or stated meetings, no notice thereof is required, unless the statute or by-laws so provide. Members are bound to take notice of such meetings. *Paola & Fall Riv. R. Co. v. Comrs. of Anderson Co.*, 16 Kans. 302; *Smith v. Law*, 21 N. Y. 296; *Porter v. Robinson*, 30 Hun. 209; *State, ex rel., v. Bonnell*, 35 Ohio St. 10; *Pike Co. v. Rowland*, 94 Penn. St. 238; *King v. Hill*, 4 B. & C. 426. Where the statute fixes the time but not the place, notice must be given of the place. *Cassell v. Lexington, etc., Turnpike Road Co. (Ky.)*, 9 S. W. Rep'r, 701; S. C., 9 S. W. Rep'r, 502. So where the by-laws fixed the *day* and place of the annual meeting of stockholders, it was held that notice must be given of the hour. *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534. Where meetings of directors had been held every Monday for six years, it was held to show that such meetings were stated and regular so as to dispense with notice, and that it was immaterial how the time was originally fixed. *Atlantic Mut. Fire Ins. Co. v. Sanders*, 36 N. H. 252.

If the statute or by-laws require notice, that notice must be given, unless waived by unanimous consent. Stockholders of *Shelby R. Co. v. Louisville, etc., R. Co.*, 12 Bush, 62; *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247; *In Matter of Long Island R. Co.*, 19 Wend. 37; *Stevens v. Eden Meeting-House Society*, 12 Vt. 688; *Farwell v. Houghton Copper Works*, 8 Fed. Rep'r, 66.

In case of all meetings of the board of directors, except stated or regular meetings, it is essential to a valid meeting that notice of the time and place thereof should be given to each member of the board whether required by the statute or by-laws or not. *Simon v. Sevier Assn.*, 54 Ark. 58; *Harding v. Vandewater*, 40 Cal. 77; *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534; *Thompson v. Williams*, 76 Cal. 153; *Stow v. Wyse*, 7 Conn. 214; *Scott v. Paulen*, 15 Kans. 162; *Paola & Fall River R. Co. v. Comrs of Anderson Co.*, 16 Kans. 302; *Cassell v. Lexington, etc., Turnpike Road Co. (Ky.)*, 9 S. W. Rep'r, 701; S. C., 9 S. W. Rep'r, 502; *Jackson v. Hampden*, 20 Me. 37; *Jackson v. Hampden*, 16 Me. 184; *Wiggin v. Freewill Baptist Church*, 8 Met. 301; *Doyle v. Mizner*, 42 Mich. 332; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; *State v. Ferguson*, 31 N. J. Law, 107, 124; *People v. Batchelor*, 22 N. Y. 128; *People, ex rel., etc., v. Albany Medical College*, 26 Hun, 348; *State, ex rel., etc., v. Bonnell*, 35 Ohio St. 10; *Doernbecher v. Columbia City Lumber Co. (Oreg.)*, 28 Pac. Rep'r, 899; *Gordon v. Preston*, 1 Watts, 385; *Pike County v. Rowland*, 94 Penn. St. 238; *Atlantic De Laine Co. v. Mason*, 5 B. I. 463; *Moore v. Hammond*, 6 Barn. & Cress. 456; *King v. Langhorn*, 4 Ad. & El. 538; *Rex v. Mayor, etc., of Liverpool*, 2 Burr. 721, 723; *Rex v. Mayor, etc., of Doncaster*, 2 Burr. 738; *Smyth v. Darley*, 2 H. L. Cas. 789, 802; *King v. Hill*, 4 B. & C. 426; 1 Kyd Corp. 430, 438. But see *Edgerly v. Emerson*, 23 N. H. 555; *Porter v. Robinson*, 30 Hun, 209.

It does not change the rule that a statute provides that the powers vested  
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in the board may be exercised by a majority thereof, as such statute will be construed to mean that the majority must be duly convened as a board, that is, that notice must be given to each member, of the time and place of meeting. *Doernbecher v. Columbia Lumber Co. (Oreg.)*, 28 Pac. Rep'r, 899; *Simon v. Sevier Assn.*, 54 Ark. 58; *Harding v. Vandewater*, 40 Cal. 77; *Pike County v. Rowland*, 94 Penn. St. 238. But see *Edgerly v. Emerson*, 23 N. H. 555; *Porter v. Robinson*, 30 Hun, 209.

The reasons for the rule requiring notice are thus given by Brewer, J., now of United States supreme court: "Nor is this merely an arbitrary rule, but founded upon the clearest dictates of reason. Whenever a matter calls for the exercise of deliberation and judgment, it is right that all parties and interests to be affected by the result should have the benefit of the counsel and judgment of all the persons to whom has been intrusted the decision. It may be that all will not concur in the conclusion; but the information and counsel of each may well affect and modify the final judgment of the body. Were the rule otherwise, it might often happen that the very one whose judgment should and would carry the most weight, either by reason of his greater knowledge and experience concerning the special matter, by his ripe wisdom and better judgment, or by his greater familiarity with the wishes and necessities of those specially to be affected, or from any other reason, and who was both able and willing to attend, is through lack of notice an absentee. All the benefit, in short, which can flow from the mutual consultation, the experience and knowledge, the wisdom and judgment of each and all the members, is endangered by any other rule. Again, any other rule would be fraught with danger to the rights of even a majority, as, when legally convened, the ordinary rule in the absence of special restriction being that a quorum can act and a majority of the quorum bind the body, it would, but for this rule, often be in the power of an unscrupulous minority to bind both the body and the corporation for which it acts to measures which neither approve of. Thus, were the body composed of twelve members, a quorum of seven could act, and a majority of that quorum, four, could bind the body. An unscrupulous minority of four by withholding notice to five, might thus bind both the body and the corporation. Reason, therefore, and authority unite in saying that notice to all the members to whom notice is practicable, is essential to a legal special session."

2. Of the manner of giving notice and what it should contain.—The notice required by the common-law rule above referred to must be what is known in the books as reasonable notice. *King v. Hill*, 4 B. & C. 426; *Covert v. Rogers*, 38 Mich. 368; *Wiggin v. Freewill Baptist Church*, 8 Met. 301; *In re Long Island R. Co.*, 19 Wend. 87; 1 *Spelling Corp.*, § 389. It must be such as will enable the person notified, traveling in the ordinary way, to be present at the meeting. *Id.*

The notice should be signed or given by some one having authority to do so. *Johnston v. Jones*, 23 N. J. Eq. 216. It has been held that a managing agent has such authority. *Stebbins v. Merritt*, 10 Cush. 27. A statute provided that a meeting of stockholders could be called by the board of directors or by any number of stockholders holding at least one-tenth of the stock. In a case where there was no board of directors and no secretary, it was held that a meeting called and notified by one signing himself secretary was invalid, al-

though he had in fact been requested by the requisite number of stockholders. *Reilly v. Oglesby*, 25 W. Va. 36.

There is considerable difference of opinion as to how notice must be served or given. It is said in many cases that the notice must be *personal* in the absence of any provision in the statute or by-laws to the contrary. *Harding v. Vandewater*, 40 Cal. 77; *Stow v. Wyse*, 7 Conn. 214; *Savings Bank v. Davis*, 8 Conn. 191; *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247; *Pike County v. Rowland*, 94 Penn. St. 238. In *Paola & Fall River R. Co. v. Comrs. of Anderson County*, 16 Kans. 302, it is said that there must be personal notice *when practicable*. In most, if not all the cases in which this doctrine is laid down, it will be found that no notice was given and the question whether some other than personal notice was sufficient was not involved. Notice sent by mail was held sufficient in *Younglove v. Steinman*, 80 Cal. 375; *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247; *People, ex rel., etc., v. Albany Medical College*, 26 Hun, 348. So of notice left at one's usual place of residence. *Jackson v. Hampden*, 16 Me. 184. In *Williams v. German Mut. Fire Ins. Co.*, 68 Ill. 387, verbal notice left by the secretary with the brother of a director at the latter's place of business was held sufficient.

In *People v. Albany Medical College*, 26 Hun, 348, the court says: "It is undoubtedly the rule of the common law that, unless the statute or the by-laws of a corporation prescribe the notice to be given of a meeting, each member must have actual notice, and in default of such notice proceedings had at it are invalid except all are present and concur in the act. *Rex v. Liverpool*, 2 Burr. 723; *Rex v. Chetwynd*, 7 B. & C. 695; *Potter Corp.*, § 396, and cases cited; *Wiggin v. Elders, etc.*, 8 Met. 301. There is no reported case in this state which we can find prescribing the manner of service of such notice. Nor can we find any decided case in the books in which it is held that the notice must be personal as distinguished from actual. It is true that, in a note to section 337 of his work on Corporations, Judge Potter says that the notice must be personal, but he does not so state in the text, and neither the cases he cites, nor any other cases, so hold. In *Rex v. Liverpool*, 2 Burr. 723-731, the objection to the validity of the meeting was that no notice had been given, and Lord Mansfield held that each member must be actually summoned. In *Stow v. Wyse*, 7 Conn. 214, the vote in question had been taken at a meeting of which no notice had been given. The point decided was that the vote was not valid. No question was made as to the kind of notice required. So in *Wiggin v. Freewill Baptist Church*, 8 Met. 301, 310, the notice had been given by posting in three places. The court do not pretend to say what kind of notice was required, but holds only that the members must all have notice, and that the notice there given was not sufficient. In *Taylor v. Griawold*, 2 Green (14 N. J. Law), 222, and in *Savings Bank v. Davis*, 8 Conn. 191, cited by Judge Potter, the question was not involved. The result of the decisions is that an actual notice must be given to each member, and we are not required to hold that such notice must be personal. Such notice as is required in legal proceedings need not be given, for the notice of the meeting is sufficient if verbal (*Wilcock Mun. Corp.*, 46), or if given by letter to non-residents (*Stebbins v. Merritt*, 10 Cush. 27), or if left at the house of a member in his absence. *Angell & Ames Corp.*, § 493. It is clear that the important thing is to bring to the knowledge of each member the fact that a



meeting is to be held. If each member has that knowledge the cases agree that the meeting is valid."

No particular form of notice is required in any case, nor is the notice to be subjected to technical criticism. It is sufficient if it can be understood as intended. *Merritt v. Ferris*, 22 Ill. 303; *South School District v. Blakeslee*, 13 Conn. 227. It should state the time and place of the meeting and specify the business to be transacted when required. *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534; *Granger v. Original Empire Mill & Min. Co.*, 59 Cal. 678; and see the cases cited in the last section. A meeting convened before the time specified would be irregular. *People v. Albany, etc.*, R. Co., 55 Barb. 844; but it may convene within a reasonable time afterward. *South School District v. Blakeslee*, 13 Conn. 227. But a meeting cannot be held in the afternoon under notice for one in the morning. *State, ex rel., v. Bonnell*, 35 Ohio St. 10. Doubtless the place might be fixed by usage so that it need not be specified in the notice.

When the object of the meeting is to transact the ordinary business or affairs of the corporation, the notice need not state the matters to be acted upon. 1 *Spelling Corp.*, § 889; 1 *Beach Corp.*, § 283; *Savings Bank v. Davis*, 8 Conn. 191; *Warner v. Mower*, 11 Vt. 885; *Sampson v. Bowdoinham Steam Mill Corp.*, 36 Me. 78. But when the matters to be acted upon are out of the ordinary course of business they should be specified in the notice. *Merritt v. Ferris*, 22 Ill. 303; *Stockholders of Shelby R. Co. v. Louisville, etc.*, R. Co., 12 Bush, 62, 70; *People's Mut. Ins. Co. v. Westcott*, 14 Gray, 440; *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463; *Machell v. Nevinson*, 11 East, 84, note; *In re Bridport Old Brewery Co.*, L. R., 2 Ch. App. 191. Giving a mortgage to secure a debt already contracted has been held to fall within the category of ordinary business. *Savings Bank v. Davis*, 8 Conn. 191. Levying an assessment on paid-up stock has been held to be outside of the ordinary business of the company and to require special notice. *Atlantic De Laine Co. v. Mason*, 5 R. I. 463. See, also, *Wiggin v. Freewill Baptist Church*, 8 Met. 301; *Halifax Sugar. Ref. Co. v. Francklyn*, 5 L. J. Ch. 591.

3. **Waiver of notice.**—If a director is present and takes part in a meeting, he cannot afterwards object that he was not duly notified thereof. *Kenton Furnace, etc., Co. v. McAlpin*, 5 Fed. Rep'r, 737; *Jones v. Milton & Rushville T. Co.*, 7 Ind. 547; *Bucksport & Bangor R. Co. v. Buck*, 68 Me. 81; *People, ex rel. Smith, v. Peck*, 11 Wend. 604; *School District v. Bennett*, 52 Ark. 511. When stock is owned by a firm, one member of the firm may waive notice in behalf of the firm, by attending and participating in a stockholders' meeting. *Kenton Furnace, etc., Co. v. McAlpin*, 5 Fed. Rep'r, 737. If all the members are present and consent, a meeting may be held without notice. *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534; *Chase v. Tuttle*, 55 Conn. 455; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; *State v. Pettineli*, 10 Nev. 141; *Pike County v. Rowland*, 94 Penn. St. 288; *Reilly v. Oglesby*, 25 W. Va. 36; *King v. Theodorick*, 8 East, 543; *Machell v. Nevinson*, 11 East, 84, note; *Smyth v. Darley*, 2 H. L. Cas. 789, 802; *In re British Sugar Ref. Co.*, 3 Kay & J. 408. In case of public bodies it has been said that if the statute requires notice, it cannot be waived even by unanimous consent. *King v. Theodorick*, 8 East, 543.

If the action taken at a meeting not duly called and notified, is approved at a subsequent meeting duly convened, the irregularity of the first meeting becomes immaterial. *County Court v. B. & O. R. Co.*, 85 Fed. Rep'r, 161.

4. When failure to notify does not vitiate — effect of absence or removal. —

In view of the imperative requirements of the general rule as to notice of meetings and the liability in these days of members being absent on business or pleasure and beyond the reach of service, it becomes important to determine whether notice can be dispensed with in cases where notice is impossible or impracticable. Corporations may and should by their by-laws anticipate and provide for such emergencies. It has been held in various cases in England, in reference to meetings or elections held by municipal bodies, that the failure to summon a member who was not within summoning distance did not vitiate the action taken. *Rex v. Mayor, etc., of Liverpool*, 2 Burr. 728, 731; *Rex v. Mayor, etc., of Doncaster*, 2 Burr. 788; *Rex v. Grimes*, 5 Burr. 2598; *King v. Langhorn*, 4 Ad. & El. 538; *Smyth v. Darley*, 2 H. L. Cas. 789, 802. All must be summoned "unless those not summoned were beyond summoning distance, as, for instance, abroad." *Smyth v. Darley*, 2 H. L. Cas. 789, 802. Where a burgess had told the bailiff that he need not summon him as he was frequently absent, it was held to be no excuse. "Nothing but actual impossibility will cure the omission." *Per Denman, C. J., King v. Langhorn*, 4 Ad. & El. 538. By not "being within summons," the courts appear to mean non-residence. *Rex v. Grimes*, 5 Burr. 2598; 1 Kyd Corp., pp. 430, 438; *Grant Corp.*, p. 156. In *Pike County v. Rowland*, 94 Penn. St. 288, in speaking of members of a board of county commissioners, it is said that if one has quit the municipality and has no family or house within its limits, notice to him is unnecessary.

Where a member of a school board in New York was absent in Minnesota, a meeting without notice to him was held valid. *Porter v. Robinson*, 30 Hun, 209. The court says: "The object of notice is to give the person notified an opportunity to attend. There is no other virtue in the notice. Now, where a person, elected as a trustee, is at the time of his election in a distant state and continues there all the time until after the meeting in question, never having had any formal notice of his election, it would be unreasonable to say that a meeting was made invalid by a failure to give him notice thereof. Must a personal notice be served on him in Minnesota? Or if notice left at his house is sufficient, of what use would it be to one who is beyond its reach? It cannot be necessary to do an act, which, when done, would be of no use. By remaining where he could not attend the meetings of the board of education, Stone practically waived any notice of such meetings; and indeed put it beyond the power of the proper officer to give any."

In case of a school committee of three, while one was absent from town, the other two held a meeting and discharged a teacher. There was no attempt to notify the absentee. Their action was held to be void. *Jackson v. Hampden*, 16 Me. 184. "In this case," says the court "it is not probable that a notice to the third member of the committee would have been of any practical utility, because it is understood that he was so situated that he would not have been present if notified. But that does not allow the majority to dispense with the rule requiring notice. They are not, in such cases, constituted the judges whether the notice would be effectual to secure his attendance. Nor would it

be entirely safe to intrust to them such a power, as it would afford an opportunity to select an occasion, when they might judge that a notice would be ineffectual, and thus, by neglecting to give it, free themselves from the presence of a dissenting minority. And if notice be always required, it may often happen that those will be able to attend who were believed to be so situated that their attendance could not be expected. Nor is there any difficulty in giving the requisite notice in such cases; as one left at the usual place of residence would be sufficient. Such a course may cause some delay and embarrassment in the execution of some of their duties, but whether this will be a greater evil than those alluded to, and that of allowing majorities to act in all cases without the knowledge and assistance of minorities, thus constituting the majority in effect the whole committee, the legislature must judge. The court can only apply the rule of law as it finds it established."

A Connecticut corporation had five directors. At the time in question, one was absent in Montana and another was in South Carolina. A special meeting was called for the purpose of making an assignment for the benefit of creditors. Telegrams were sent to the absentees at their places of residence but were not received by them. The three remaining members met at the time appointed and made the assignment and their action was upheld. *Chase v. Tuttle*, 55 Conn. 455. The court says: "We do not think the assignment invalid for want of actual notice to the two directors who were at the time absent from the state. Notice was sent by telegram to them as to the others, at their address in this state, but one being in the territory of Montana and the other in South Carolina, they failed to receive the notices. Under these circumstances it would seem unreasonable to hold that a majority of the whole number, being present, could not do a legal act binding on the corporation. The exigency demanded immediate action to save the property and to save expense. It is easy to see how disastrous might be the consequences were we to adopt the principle contended for by the defendants. The situation of the absent directors might be much more remote and inaccessible than in the present case, requiring several months to reach them by actual notice. Must the corporation remain paralyzed all this time, without ability to protect itself?"

By the articles of association of an English corporation the number of directors was to be not less than three, nor more than six. In case of vacancies, the remaining members could act as long as they were not less than three. Three constituted a quorum. At a time when there were four directors a meeting was held by two, without notice to the other two, at which a deed was made to secure certain debenture bonds. Of the two directors not present, D. resided in Nova Scotia and was elected for the purpose of looking after the interests of the company in that quarter. The other, a Mr. Ryder, was traveling in America and it was not known exactly where he was. In a suit involving the validity of the deed, Sterling, J., held that as D. never had been and was not expected to be in England, it was unnecessary to notify him. As to Mr. Ryder he said: "The other director is Mr. Ryder. The evidence is that he was out of the country and in America; that he was traveling about and it was not known where he was. It was almost impossible to give him notice of the meeting, and, therefore, it seems to me, on the ground that the business of the company cannot be stopped by a director choosing to go away to America, or traveling about, that notice to him was unnecessary." It was accord-

ingly held that the meeting was lawful and the deed valid. *Halifax Sugar Ref. Co. v. Fransky*, 8 Ry. & Corp. L. J. 91; 59 L. J. Ch. 591. The judge declined to lay down the general rule that mere absence from the country was sufficient to excuse notice, as in case of a meeting in Dover and the absentee being in Calais.

The fact that a director is personally interested in the matter to be acted upon does not excuse notice to him. *Doevnebecher v. Columbia City Lumber Co.* (Oreg.), 28 Pac. Rep'r, 899.

5. *Presumption as to notice and regularity of meeting.*—When it is made to appear that a meeting has been held at which a quorum was present, it will be presumed that it was regularly called and notified until the contrary is shown. *Granger v. Original Empire Mill & Min. Co.*, 59 Cal. 678; *South School District v. Blakeslee*, 18 Conn. 237; *Lane v. Brainard*, 20 Conn. 565; *Chase v. Tuttle*, 55 Conn. 455; *Copp v. Lamb*, 12 Me. 812; *Sargent v. Webster*, 13 Met. 497; *Chouteau Ins. Co. v. Holmes' Admr.*, 68 Mo. 601; *Leavitt v. Oxford & Geneva S. M. Co.*, 8 Utah, 265; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. So where the records of a corporation show that a meeting was duly called and that proper notice was given, it will be presumed that a quorum attended until the contrary appears. *Citizens' Mut. Fire Ins. Co. v. Southwell*, 8 Allen, 217. Where the by-laws required meetings to be held in the counting room and it appeared that a meeting was held at the house of the general agent, it was presumed in favor of the meeting that the counting-room was at the general agent's house. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

6. *Adjourned meetings.*—Where a meeting has been duly convened, either in pursuance of the by-laws or of proper notice, members are bound to take notice of adjournments, and no new notice of such adjourned meetings is necessary, even in case of those who did not attend the original meeting. *Smith v. Law*, 21 N. Y. 296; *Pike County v. Rowland*, 94 Penn. St. 288. Such adjournments should be to a specified hour in order to keep up the continuity of the original meeting. Where three of five directors meet on the day of a regular meeting and voted to change the office of the company and adjourned to meet at the new office on the next day without specifying any hour, and the three met on the next day without notice to the other two, and levied an assessment, it was held that their action was invalid. The failure to specify an hour made the second meeting, in effect, a special one, requiring notice to all the members. *Thompson v. Williams*, 76 Cal. 153. See, also, *People v. Batcheler*, 22 N. Y. 128.

## DOON TOWNSHIP V. CUMMINS.

(Supreme Court of the United States, January 4, 1892.)

1. *MUNICIPAL BONDS. ISSUE IN EXCESS OF CONSTITUTIONAL LIMIT.* When the bonded indebtedness of a school district is already in excess of the constitutional limit, a further issue of bonds for the purpose of "funding the outstanding bonded indebtedness of the district," which bonds are sold for that purpose, is void though made pursuant to statutory authority.

2. **EFFECT OF RECITALS.** Recitals in the bonds that the same are in accordance with the law and the constitution, will not estop the district as against one who purchases the same directly from the district to an amount in excess of the constitutional limit, as shown by public records of which he was bound to take notice.

3. **PAYMENT OF INTEREST. RATIFICATION.**—The payment of interest on the bonds for several years could not have the effect of validating the bonds by ratification since a ratification can have no greater effect than a previous authority, and as neither the district nor its officers had power to authorize the bonds, they could not ratify or validate them by the payment of interest or otherwise.

**I**N error to the circuit court of the United States for the northern district of Iowa. Reversed.

**STATEMENT BY MR. JUSTICE GRAY.**

The original action was brought by Theron Cummins, a citizen of Illinois, on coupons attached to negotiable bonds issued by the defendant, a district township of Iowa, under the statute of Iowa of 1880, chapter 132, the material provisions of which are copied in the margin.\*

The defendant denied the validity of the bonds, on the ground that they were issued in violation of the constitution of Iowa of 1857, article 11, section 3, likewise copied in the margin.†

A jury was duly waived, and the case was submitted to the circuit court, which found the following facts:

The defendant is a school district in Lyon county, Iowa, hav-

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\* **SECTION 1.** Any independent school district or district township now or hereafter having a bonded indebtedness outstanding is hereby authorized to issue negotiable bonds, at any rate of interest not exceeding seven per cent per annum, payable semi-annually, for the purpose of funding said indebtedness, said bonds to be issued upon a resolution of the board of directors of said district; provided that said resolution shall not be valid unless adopted by a two-thirds vote of said directors.

§ 2. The treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par, but the bonds hereby authorized shall be issued for no other purpose than the funding of outstanding bonded indebtedness. Laws Gen. Assem. Iowa, 127.

† No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax-lists previous to the incurring of such indebtedness. 1 Charters & Consts. 565.

ing power to contract in its corporate name, and to issue negotiable bonds. From the date of its organization its affairs have been badly managed, and, through fraud and incompetency on the part of the officers of the district, indebtedness to a very large extent has been created against the district, part of which was evidenced by bonds of the district, part by judgments against it, and part by warrants or orders drawn on its different funds.

On July 9, 1881, the board of directors of the district unanimously adopted a resolution to issue, "for the purpose of funding the outstanding bonded indebtedness of the district," bonds to an amount not exceeding \$25,000, in accordance with the statute aforesaid, to run for ten years and payable after five years, at the pleasure of the district, and bearing interest at the annual rate of seven per cent, with interest coupons attached; and appointing one Richards "refunding agent to negotiate said bonds," to take up the aforesaid indebtedness, and to report his doings to the district.

In pursuance of this resolution twenty-five bonds were prepared and signed by the proper officers of the district, dated July 11, 1881, for the sum of \$1,000 each, having the statute aforesaid printed upon them, and containing the following recital: "This bond is executed and issued by the board of directors of said school district in pursuance of and in accordance with chapter 132, Laws 18th Gen. Assem., Iowa, is in accordance with the laws and constitution of the state of Iowa, and in conformity with a resolution of said board of directors passed in accordance with said chapter 132 at a meeting thereof held 9th day of July, 1881."

Ten of these bonds were sold on July 25, 1881, and ten others on August 11, 1881, for their par value in cash, by Richards to the plaintiff, who, at the time of his first purchase, knew that it was the defendant's purpose to issue bonds to the amount of \$20,000 at least, or \$25,000 if necessary. The remaining five bonds were sold by Richards on December 20, 1881, to another party.

At the time of issuing the bonds in question, the total valuation of the taxable property within the district, as shown by the next preceding state and county tax-lists, was \$131,038. The evidence failed to show the exact amount of bonds of the defendant out-

standing on July 11, 1881, but the amount of such bonds, with interest, exceeded \$20,000. Large amounts of warrants had been issued by the district from time to time for various purposes, a portion, at least, of which was fraudulent; and there were outstanding unsatisfied judgments against it for \$11,700. Many frauds had been perpetrated by the officers of the district, and thereby the amount of indebtedness evidenced by its bonds and by judgments against it had been fraudulently increased. But the evidence failed to show that any of those bonds had been issued in violation of the above provision of the constitution of Iowa, or that a successful defense could have been interposed by the defendant against the holders of any of them.

Of the proceeds of the sale of the new bonds, the sum of \$19,174 was paid out by Richards at various times from July 30, 1881, to March 4, 1882, in discharging bonds, coupons, judgments, warrants and orders drawn on the teachers' contingent and school-house funds, and the balance of \$6,485.79 was paid to the defendant's treasurer. His report, which was made part of the findings of fact, showed that, of the sum of \$19,174, less than \$6,000 was applied to the payment of outstanding bonds and coupons, \$875 in paying interest on the new bonds, and the rest to the other purposes above mentioned.

The defendant regularly paid interest on the new bonds until and including July, 1885, and this action was brought on the coupons falling due in 1886, 1887, 1888 and 1889.

On these facts the court gave judgment for the plaintiff for \$6,462.40, being the amount of the coupons sued on, with interest. 42 Fed. Rep'r, 644. The defendant sued out this writ of error.

*B. F. Kauffman* for plaintiff in error. *J. H. Swan* for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The constitution of Iowa, article 11, section 3, ordains as follows: "No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation,

to be ascertained by the last state and county tax-lists, previous to the incurring of such indebtedness."

The scope and meaning of this provision of the fundamental and paramount law of the state are clear and unmistakable. No municipal corporation "shall be allowed" to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted "in any manner or for any purpose." The limit of the aggregate debt of the municipality is fixed at five per cent of the value of the taxable property within it; and that value is to be ascertained "by the last state and county tax-lists," which are public records, open to all, and of the contents of which all are bound to take notice. The prohibition is addressed to the legislature as well as to all municipal boards and officers, and to the people, and forbids any and all of them to create, or to give binding force to, any debts of the corporation in excess of the limit prescribed. The prohibition extending to debts contracted "in any manner, or for any purpose," it matters not whether they are in every sense new debts, or are debts contracted for the purpose of paying old ones, so long as the aggregate of all debts, old and new, outstanding at one time, and on which the corporation is liable to be sued, exceeds the constitutional limit. The power of the legislature in this respect being restricted and controlled by the constitution, any statute which purports to authorize a municipal corporation to contract debts in any manner or for any purpose whatever in excess of that limit is to that extent unconstitutional and void.

By the terms of the statute of Iowa of 1880, chapter 132, under which the bonds in question were issued, any independent school-district or district township, having a bonded indebtedness outstanding, is authorized to issue negotiable bonds for the purpose of funding that indebtedness; and "the treasurer of such district is hereby authorized to sell the bonds provided for in this act at not less than their par value, and apply the proceeds thereof to the payment of the outstanding bonded indebtedness of the district, or he may exchange such bonds for outstanding bonds, par for par."

There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative, of exchanging bonds issued under the statute for outstanding bonds, by



which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the constitution. But under the first alternative, by which the treasurer is authorized to sell the new bonds, and to apply the proceeds of the sale to the payment of the outstanding ones, it is evident that, if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones; the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if new bonds equal in amount to the old ones are so issued at one time, is doubted; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged.

It is true that if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit. But it is none the less true that it has been increased in the interval; and that, unless those officers do their duty, the increase will be permanent. It would be inconsistent alike with the words, and with the object, of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers.

There could be no better illustration of the reasonableness, if not the necessity, of this construction, in order to secure to municipal corporations the protection intended and declared by the constitution of the state, than is afforded by the facts of the present case. The total valuation of the property of the district, as shown by the last state and county tax-list before it issued the bonds in question, was \$131,038, five per cent of which, or \$6,551.90, was the limit beyond which it was prohibited by the constitution to contract debts. Its outstanding bonded debt was already not less than \$20,000, which upon the facts found must be assumed to be valid. For the purpose of funding that debt it executed and sold bonds to the amount of \$25,000, and it actually applied less than \$6,000 of the proceeds of the sale to

the payment of outstanding bonds. The result of holding the new bonds good would be to double the whole bonded debt of the district, and to bring it up to about thirty per cent of the valuation.

This construction of the constitution of Iowa appears to us to be warranted, and indeed required, by previous decisions of this court.

In construing a prohibition of the constitution of Illinois of 1870, article 9, section 12, expressed in substantially the same words, this court, speaking by Mr. Justice Harlan, said: "The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount." "No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur." *Buchanan v. Litchfield*, 102 U. S. 278, 287, 288. It is proper to add that the bonds there held invalid recited that they had been issued in accordance with a certain legislative act and municipal ordinance, but neither the bonds, the statute nor the ordinance mentioned the constitutional restriction; and that it was intimated in the opinion that if the bonds had contained further recitals which, fairly construed, amounted to a representation that the proposed indebtedness was within the constitutional limit, the city might have been estopped to dispute the truth of the representation as against a *bona fide* holder of the bonds. 102 U. S. 290, 292. This court afterward held that the original purchaser of the bonds thus held invalid could not maintain a suit in equity against the city to recover back the money paid for them; and, speaking by Mr. Justice Miller, after quoting the constitutional provision, and emphasizing the words, "indebted in any manner or for any purpose," said: "It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes nor by express or implied promises. Nor shall it be done for any purpose. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the

sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth any thing, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law." *Litchfield v. Ballou*, 114 U. S. 190, 192, 193; 5 Sup. Ct. Rep'r, 820.

In *Dixon Co. v. Field*, 111 U. S. 83; 4 Sup. Ct. Rep'r, 315, there was brought in question the effect of the constitution of Nebraska of 1875, article 12, section 2, prohibiting any county or other subdivision of the state from ever making donations to any railroad, without a vote of the qualified electors thereof at an election held by authority of law, and providing that its donations "in the aggregate shall not exceed ten per cent of the assessed valuation of the county" (with a proviso immaterial to that case), and that "no bonds or other evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of the state showing that the same is issued pursuant to law." Bonds issued by a county beyond ten per cent of its assessed valuation were held to be void, even in the hands of a *bona fide* holder, although each bond, after stating the whole amount issued, stated that they were issued pursuant to an order of the county commissioners, and authorized by an election held on a certain day, and under and by virtue of certain statutes and the constitution of the state, and bore a certificate of the secretary and auditor that "it was issued pursuant to law." In delivering the opinion of the court, Mr. Justice Matthews said: "We regard the entire section as a prohibition upon the municipal bodies enumerated, in the matter of creating and increasing the public debts, by express and positive limitations upon the legislative power itself." 111 U. S. 89; 4 Sup. Ct. Rep'r, 317. "No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by reference to that record that is made by the constitution the standard for measuring the limit of the municipal power." 111 U. S. 95; 4 Sup. Ct. Rep'r, 320.

The constitution of Colorado of 1876, article 11, section 6, provides that the indebtedness contracted in any one year, by any county having a valuation of not less than \$1,000,000, shall not

exceed a certain per cent on its assessed valuation, and that "the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited." This court held in *Lake Co. v. Rollins*, 130 U. S. 362; 9 Sup. Ct. Rep'r, 651, that this provision limited the power of the county to contract debts for any purpose whatever; and in *Lake Co. v. Graham*, 130 U. S. 674; 9 Sup. Ct. Rep'r, 654, that the county was not estopped, as against a *bona fide* holder for value, to show that the constitution had been violated by issuing bonds which recited the whole amount issued, and that they were issued "under and by virtue of and in full compliance with" a certain statute, and that "all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." In the latter case Mr. Justice Lamar, delivering judgment, said: "In this case the constitution charges each purchaser with knowledge of the fact that, as to all counties whose assessed valuation equals \$1,000,000, there is a maximum limit beyond which those counties can incur no further indebtedness under any possible conditions, provided that, in calculating that limit, debts contracted before the adoption of the constitution are not to be counted." 130 U. S. 680; 9 Sup. Ct. Rep'r, 655. And again: "In this case the standard of validity is created by the constitution. In that standard two factors are to be considered: one the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being exactions of the constitution itself, it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts. In the case of *Sherman Co. v. Simons*, 109 U. S. 735; 3 Sup. Ct. Rep'r, 502, and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was that the legislature, being the source of exaction, had created a board authorized to determine whether its exaction had been complied with, and that its finding was conclusive to a *bona fide* purchaser." 130 U. S. 683, 684; 9 Sup. Ct. Rep'r, 654.

It is hardly necessary to add that the payment of some installments of interest cannot have the effect of ratifying bonds issued

beyond the constitutional limit; for a ratification can have no greater effect than a previous authority; and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them by the payment of interest or otherwise. *Marsh v. Fulton Co.*, 10 Wall. 676; *Association v. Topeka*, 20 Wall. 655; *Daviess Co. v. Dickinson*, 117 U. S. 657; 6 Sup. Ct. Rep'r, 897; *Norton v. Shelby Co.*, 118 U. S. 425, 451; 6 Sup. Ct. Rep'r, 1121.

In the supreme court of Iowa it is settled law that the constitutional restriction includes not only municipal bonds, but all forms of indebtedness, except warrants for money actually in the treasury, and, perhaps, contracts for ordinary expenses within the limits of the current revenues. *Scott v. Davenport*, 34 Iowa, 208; *McPherson v. Foster*, 43 Iowa, 48; *Mosher v. School Dist.*, 44 Iowa, 122; *Council Bluffs v. Stewart*, 51 Iowa, 385; 1 N. W. Rep'r, 628; *Kane v. School District (Iowa)*, 47 N. W. Rep'r, 1076. And a school district has been adjudged to be a political or municipal corporation, within the meaning of the constitution. *Winspear v. Holman Tp.*, 37 Iowa, 542; *Mosher v. School Dist.*, and *Kane v. School Dist.*, above cited.

In *Scott v. Davenport* it was held that after the constitutional limit had been reached, by debts contracted either before or after the constitution took effect, no new debts could be contracted, even for the purpose of erecting public works from which it was expected that the city would derive a revenue. In *McPherson v. Foster* it was held that bonds issued in excess of the constitutional limit were void even in the hands of a *bona fide* purchaser for value, and could not be ratified by the municipality by payment of interest or otherwise. In *Mosher v. School District* it was again held that such bonds were void against a *bona fide* holder, and that a statute giving a lien on a school-house for materials for which such bonds had been given was unconstitutional. In *Council Bluffs v. Stewart* it was held that uncollected taxes and the levy for the current year could not be deducted from the outstanding debt for the purpose of ascertaining the real indebtedness, and that the contrary view "confounds the distinction between an indebtedness and insolvency." 51 Iowa, 396; 1 N. W. Rep'r, 628.

The Iowa cases cited by the defendant in error fail to sup-

port his position. In *Austin v. Colony Tp.*, 51 Iowa, 102, the limit in question was not fixed by the constitution, but by a vote of the district. In *Sioux City v. Weare*, 59 Iowa, 95; 12 N. W. Rep'r, 786, the bond held valid was issued and received in payment and satisfaction of a judgment for a tort, and that judgment was not shown to have been in excess of the constitutional restriction. There the bond took the place of the judgment, and, therefore, as observed by the court, did not increase the city's indebtedness.

The case of *Railway Co. v. Osceola Co.*, 45 Iowa, 168, arose under the statute of Iowa of 1872, chapter 174, which provided that a judgment creditor of a municipal corporation in lieu of an execution against its property might demand and receive the amount of his judgment and costs in bonds of the corporation; and the decision was that a bond given by a county under that statute in payment of a judgment recovered upon a warrant of the corporation could not be defeated in the hands of a *bona fide* holder by evidence that the warrant was issued in excess of the constitutional restriction, and that the supervisors of the county fraudulently omitted to interpose the defense in the action upon the warrant. That decision went upon the ground that there having been no defense by the supervisors nor interposition by the tax-payers in the action on the warrant, the purchaser of the bond had the right to presume that there was no defect in the judgment. 45 Iowa, 175, 176. In a subsequent case between the same parties, the county having given bonds partly in exchange for county warrants and partly in exchange for judgments upon such warrants, all the warrants having been issued in excess of the constitutional limit, and all the bonds having passed out of the hands of their original holders, was restrained by injunction from paying the bonds exchanged for warrants on which no judgment had been recovered, and was permitted to pay those bonds only given in exchange for judgments. Appeal was taken from the latter part of the decree only, and the judgment of the supreme court of the state, following its former decision between the parties, was confined, in express terms, as well as in legal effect, to "the validity of negotiable bonds of a county, issued in satisfaction of a judgment, in the hands of innocent holders for value." 52 Iowa, 26, 28; 2 N. W. Rep'r, 593. The rule there

acted on is restricted to such a case in the opinion in *Miller v. Nelson*, 64 Iowa, 458, 461 ; 20 N. W. Rep'r, 759, and by the adjudication of the same court in a very recent case not yet published in the official reports. *Kane v. School Dist. (Iowa)*, 47 N. W. Rep'r, 1076.

In the case at bar, the new debts did not arise on warrants for money actually in the treasury of the district, or on contracts for ordinary expenses payable out of its current revenues ; and none of the bonds in question were given in payment and satisfaction of judgments. Nor did the plaintiff buy the bonds for value, in good faith, and without notice of any defect, from one to whom they had been issued by the district. He was himself the person to whom they were originally issued by the district, and knew, when he took the first ten bonds, that the district, in issuing them, exceeded the constitutional limit, as appearing by public records of which he was bound to take notice, and that it intended still further to exceed that limit. Under such circumstances he had no right to rely on the recitals in the bonds, even if these could otherwise have any effect as against the plain provision of the constitution of the state. By the uniform course of the decisions of the supreme court of Iowa, therefore, as well as of this court, he cannot maintain this action.

Judgment reversed, and case remanded to the circuit court, with directions to enter judgment for the defendant.\*

Mr. Justice Brown (with whom were Mr. Justice Harlan and Mr. Justice Brewer), dissenting :

These bonds were issued under an act of the legislature authorizing district townships having a bonded indebtedness outstanding to issue negotiable bonds for the purpose of funding such indebtedness, and subject to a constitutional provision that no municipal corporation shall become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent on the value of the taxable property within such corporation. The bonds were certified by the proper officers of the district to have been executed and issued in pursuance of and in accordance with the statute authorizing such bonds (a copy of which was printed upon the bonds), and in accordance with the laws and constitution of the state of Iowa, and in conformity with the resolution of the

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\* Reported in 12 Sup. Ct. Rep'r, 220; 142 U. S. 395.

board of directors, etc. Plaintiff purchased these bonds for their par value, in cash, of one Richards, who had been appointed "refunding agent to negotiate the bonds." Under the provision of the constitution, the township had no power to create an indebtedness in excess of \$6,551.90, that being five per cent of the taxable property of the township, as shown by the last tax-list previous to the issuance of said bonds.

But, granting that the indebtedness already existing exceeded the constitutional limit, these bonds were issued, not for the purpose of increasing this indebtedness, but merely to change its form and reduce its rate of interest. The object of the constitutional provision was to prevent the incurrence of a new debt or the increase of an existing debt beyond a limited amount. The object of the statute was to enable district townships to fund their indebtedness by issuing and selling bonds at not less than their par value, and applying the proceeds to the payment of such outstanding indebtedness, or by exchanging such bonds for outstanding bonds. If the construction placed upon this statute by the court be correct, it is difficult to see how any township can avail itself of it, if such township has an existing indebtedness up to the amount of the constitutional limitation, since the new bonds, whether issued to be sold for cash or to be exchanged for other bonds, must, while the process of sale or exchange is going on, nominally increase the indebtedness of the corporation. I regard this as too technical an interpretation of the constitutional provision.

In giving a construction to this clause, the supreme court of Iowa held in *Railway Co. v. Osceola Co.*, 45 Iowa, 163, that the validity of negotiable bonds of a county, issued in satisfaction of a judgment, in the hands of innocent holders for value, without notice of any claim that they are illegal for any cause, could not be questioned, by showing that the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent, and that the board of supervisors fraudulently omitted to interpose the defense when the warrants were sued upon. "When a bond," says the court, "issued in discharge of a judgment, is placed upon the market, a purchaser, who has no intimation of any thing affecting its validity, has a right to presume that the board of supervisors have been mindful of their interest and their



duty, and that all available defenses have been presented and passed upon." This case was recognized and cited with approval in *Miller v. Nelson*, 64 Iowa, 458; 20 N. W. Rep'r, 759, and *Railway Co. v. Osceola Co.*, 52 Iowa, 26; 2 N. W. Rep'r, 593. See, also, *Commissioners v. Potter*, 12 Sup. Ct. Rep'r, 216, and cases there cited; *Powell v. City of Madison*, 107 Ind. 106; 8 N. E. Rep'r, 31.

Had the proceeds of these bonds been properly applied, no question could have arisen as to the indebtedness of the township having been increased by their issue. If the district township had the right to issue the bonds, which it certainly had, if the statute under which they were issued be constitutional, the purchaser of such bonds was under no obligation to see that the money he paid for them was applied to extinguishing the existing indebtedness. He was entitled to act upon the presumption that the officers charged with the execution of the law would not betray their trust, and would deal fairly with the people who had put them forward to represent them. In my view, this is simply an attempt to saddle the holders of these bonds with the derelictions of the officials chosen by the electors of this township to act for them in this transaction, and who were alone entitled to receive the money.

**Constitutional limitation of municipal indebtedness.**—Consult *Crowder v. Town of Sullivan*, 4 Am. R. R. & Corp. Rep. 586, and note; note to *Merrill v. Town of Monticello*, 4 Am. R. R. & Corp. Rep. 301, 320; *Spilman v. City of Parkersburg*, ante, p. 370; *Chaffee County v. Potter*, ante, p. 336.

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## JENNINGS ET AL. V. GRAND TRUNK RY. CO. OF CANADA.

(Court of Appeals of New York, Second Division, Oct. 6, 1891.)

1. COMMON CARRIERS. FACTS SHOWING CONTRACT FOR THROUGH SHIPMENT. In pursuance of an inquiry from a shipper, a railroad company informed him of the through rates of transportation for certain goods to a point beyond its own line. The goods were subsequently delivered to the company, and received by it addressed to such point, which the company could reach by means of connecting railroads. Held, in an action for the non-delivery of some of the goods and delay in delivering others, that these facts were sufficient to justify a finding that the company had agreed to transport the goods beyond its own line to the place to which they were consigned.

2. **AUTHORITY OF AGENT OF SHIPPER. EFFECT OF ACCEPTING BILL OF LADING.** The carrier, which had entered into a contract with the shipper for the transportation of the goods to the place of destination, had no right to make inconsistent stipulations with the persons who delivered the goods for the shipper; and provisions and conditions in the shipping bills, signed by such persons without the knowledge of the shipper, limiting the liability of the carrier to points on its own road, cannot be considered as applicable to the shipment in question.

3. **NON-PRODUCTION OF BILLS OF LADING. PRESUMPTION.** Where the bills of lading or receipts given to the shipper when he delivered the goods to the carrier for transportation were surrendered by him on receiving the goods at their destination, the fact that he did not produce the bills or prove their contents at the trial does not give rise to a presumption prejudicial to him as to the terms of the contract of shipment contained therein.

4. **LIMITING LIABILITY. LOSS BY NEGLIGENCE.** A provision in shipping bills that the carrier should not be responsible for delay in the transit of the property does not relieve it from liability for delay occasioned by its own negligence.

5. **STIPULATION REQUIRING NOTICE OF CLAIM APPLICABLE TO SHIPMENTS BEYOND LINE.** A provision in shipping bills exempting the carrier from liability for damages, unless a written notice of the particulars of the claim is given to the freight agent at or nearest the place of delivery, within thirty-six hours after the goods have been delivered, is applicable to shipments beyond the carrier's line, as well as to shipments to points on its line.

6. **WHEN THE TIME LIMITED WILL BE DEEMED UNREASONABLE.** Such provision, which limits to thirty-six hours from the delivery of the goods the time within which notice of the particulars of the claim can be given, is void, in so far as it applies to a shipment of a car-load of potatoes, since the time allowed for making the examination and preferring the claim is unreasonably short.

**A** PPEAL by defendant from judgment entered upon order of the general term of the supreme court in the fifth judicial department affirming judgment entered on report of referee in favor of the plaintiffs. Affirmed.

For shipment and transportation to East St. Louis, Ill., J. H. Shanley & Co. caused to be delivered to the defendant, and the latter received, potatoes at the times, places, and in the quantities following: April 18, 1881, at Prescott, Canada, four hundred and one bushels; April 18, 1881, at Edwardsburgh, Canada, eight hundred and twelve bushels; April 18, 1881, at Brockville, Canada, four hundred bushels; April 20, 1881, at Brockville, Canada, four hundred bushels; April 26, 1881, at Kingston, Canada, four hundred and two bushels. The potatoes belonged to J. H. Shanley & Co., who were named as consignees of all the potatoes except those delivered to the defendant at Prescott. They

were consigned to the order of the Merchants' Bank of Canada, with directions to advise Shanley & Co., and all the potatoes reached the place of destination except those shipped at Prescott. They did not arrive there. The purpose of this action was to recover damages alleged to have been sustained by the negligence of the defendant in its failure to transport those last mentioned to the place of destination, and for their loss in consequence, and in delaying the delivery at East St. Louis of those which did reach there, by reason whereof the potatoes were injured, and the market price had fallen when they did arrive at that place. The claim of Shanley & Co. against the defendant was assigned to the plaintiffs. The referee found the facts in support of it, and directed judgment against the defendant. The defendant's railway is within the Dominion of Canada, of which it is a corporation. Its most westerly station is Point Edward, but its practical western terminus is at Fort Gratiot, in the state of Michigan, where connection is made with other railroads extending west. The plaintiffs gave evidence to the effect, and the referee found, that on February 8, 1881, Shanley & Co. wrote a letter to the defendant's agent at Toronto, requiring the lowest rates for shipment of potatoes in car-load lots from Prescott and other stations in that vicinity on its railway to East St. Louis, Ill., and certain other places, and on the 12th of that month received answer by letter from the defendant's assistant general freight agent, saying:

"I will give you the following rates on potatoes in full car-loads from Prescott, and stations in the vicinity, to \* \* \* East St. Louis, twenty-eight cents. Be good enough to let me know if these rates are accepted before shipping, so that I may advise our agents." That the rates so given were for each one hundred pounds. That on or before April 18, 1881, Shanley & Co. duly accepted such rates, and notified such assistant general freight agent of such acceptance, who, on or prior to that day, so advised defendant's local freight agents at Prescott and stations in that vicinity; and that no notice was given to Shanley & Co. by the defendant, or any of its agents, that the defendant would not assume the duties and liabilities imposed by law upon common carriers in the shipment of potatoes and their transportation between the points and for the rates mentioned. The alleged defense is that the defendant was not chargeable with the conse

quences of delay or negligence in the transportation of the potatoes beyond its own railway line; and that there were certain limitations in the contract of affreightment which relieved it from liability, and certain conditions precedent which the plaintiffs' assignors failed to observe. And to support its defense the defendant put in evidence shipping bills termed therein "shipping notes," similar in form, one of which was as follows:

"Grand Trunk Railway Company of Canada. This company will not be responsible for any goods missent, unless they are consigned to a station on their railway. Rates, weights and quantities entered on receipts are not binding on the company, and will not be acknowledged. All goods going to or coming from the United States will be subject to customs charges, etc. Prescott, Date, April 18th, 1881. The Grand Trunk Railway Company of Canada will please receive the undermentioned property in apparent good order, addressed to J. H. Shanley & Co., East St. Louis, Ill., to be sent by the said company, subject to the terms and conditions stated above and on the other side, and which are agreed to by this shipping note delivered to said company as the basis upon which their receipt is to be given for said property.

No. of Packages and Species of Goods.	Marks.	Weight, lbs.
Paid on.		24,000
1 car Potatoes, said to contain 400 bushels, in bulk, O. Risk.	C.T.	
Car 8,879.		
Via Chi. & Alton R. R.		
19 42		
80 58		
<hr/> 100 00		

"J. E. DU BRULE, Consignor."

Among the terms and conditions on the other side of this paper were the following: "General notices and conditions on carriage: (1) It is agreed and understood that the Grand Trunk Railway Co. of Canada will not be responsible for goods of any kind conveyed upon this railway unless receipted for by a duly-authorized agent of the company." "(3) Nor will the company be liable for damages occasioned by delays caused by storms, accidents, overpressure of freight or unavoidable causes, or by the weather,

wet, fire, heat, frost or delay of perishable articles, or from civil commotion." "(5) And in all cases where herein not otherwise provided the delivery of goods shall be considered complete, and the responsibility of the company shall terminate, when the goods are placed in the company's sheds or warehouse (if there be conveniences for receiving the same), at their final destination, or when the goods shall have arrived at the place to be reached on said company's railway. (6) Lumber, coals, bricks and all other goods carried by the car-load shall be taken as delivered, and the company's responsibility in respect thereof shall cease, upon the car in which they are carried being detached from the train at the station on the company's line to which it is consigned, or at the station where in the usual course of business it leaves the company's line." "(10) That all goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or they may at the discretion of the company, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be such convenience for receiving same), pending communication with consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete and all responsibility of said company shall cease, when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, misdelivery, damage or detention that may happen to goods so sent by them, if such loss, misdelivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits. (11) That all property contracted for at a through rate, otherwise to or from places beyond the line of the Grand Trunk railway, if shipped by water, shall, while not on the company's railway, or in their sheds or warehouses, be entirely at their owner's risk. In case of loss or damage to any goods for which this

company or connecting lines may be liable, it is agreed that the company or line so liable shall have the benefit of any insurance effected by or for account of the owner of said goods, and the company so liable shall be subrogated in such rights before any demand shall be made on them. (12) That no claim for damage to, loss of or detention of, any goods for which this company is accountable, shall be allowed unless notice in writing, and particulars of the claim for said loss, damage or detention are given to station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods in respect to which said claim is made are delivered. (13) Storage will be charged on all freight remaining in the company's sheds or warehouses over twenty-four hours after its arrival." "(15) That the company shall not in any case or under any circumstances, be liable for loss of market, nor will they be liable for claims arising from delay or detention of any train in the course of its journey, or at any of the stations on the way, or in starting; and the company do not undertake to load or send goods upon or by any particular train, if there be an insufficient number of cars at any station, or the cars cannot be conveniently used for the purpose, or if from any cause cars loaded at a station are unable to be sent on by trains passing or starting from such station." These shipping bills were signed by or in the name of the person who delivered the potatoes to the defendant for Shanley & Co., and the defendant's station agents gave receipts to such persons. None of the receipts were produced in evidence, nor were their contents proved. Further facts appear in the opinion.

*E. C. Sprague* for appellant. *Martin W. Cooke* for respondents.

BRADLEY, J. (after stating the facts). The place to which the potatoes were consigned was beyond the line of the defendant's railway; and, unless it had contracted to transport them further than the western terminus of its road, the duty of the defendant required it only to diligently convey the potatoes to that point, and there deliver them to the connecting carrier. *Rawson v. Holland*, 59 N. Y. 611. But the conclusion of the referee was that the defendant undertook to deliver the potatoes at East St. Louis. If that proposition is supported, the defendant was re-

sponsible for the consequences of any default or want of reasonable diligence in that respect on any part of the route, unless relieved by some limitation of liability in the contract of affreightment. *Root v. Railroad Co.*, 45 N. Y. 524; *Condict v. Railway Co.*, 54 N. Y. 500; 4 Lans. 106. The communications had between Shanley & Co., the plaintiffs' assignors, and the defendant's freight agent on the subject, had relation to through rates for transportation of the potatoes for Shanley & Co. from the places where they were afterward delivered to and received by the defendant to East St. Louis. The rates for such purpose were given and accepted. The defendant's station agents at the places of shipment were, by the direction of the freight agent, advised of the rates; and the potatoes were delivered, and in car-load lots shipped, consigned to such place of destination. They belonged to Shanley & Co., of which the station agents were also informed at the time of the delivery for shipment. The defendant's railway then had the means of connection at Ft. Gratiot and Detroit with trunk lines of railroad running westerly to Chicago and St. Louis. Although the question whether what had occurred between Shanley & Co. and the defendant's agent constituted an agreement for through transportation was not free from doubt, the finding was justified that it was such that the unqualified delivery and acceptance of the potatoes may have been treated as in pursuance of a contract to transport them to the place of destination. And, in view of the facts and circumstances furnished by the evidence, the conclusion of the referee was warranted that in such event there was an undertaking of the defendant to transport the potatoes to that place unless the contract so represented was modified by some further arrangement. *Quimby v. Vanderbilt*, 17 N. Y. 306; *Railway Co. v. Merriman*, 52 Ill. 123.

Upon that subject our attention is called to the shipping bills executed by the persons who performed the act of delivering the property, and to the receipts or bills of lading given to them by the defendant's station agents. As a general rule, the bill of lading given by a carrier to and accepted by the shipper of goods contains the contract for carriage, and, in the absence of fraud, imposition or mistake, the parties are concluded by its terms as there expressed. *Long v. Railroad Co.*, 50 N. Y. 76; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Hill v. Railroad Co.*, 73 N. Y. 351.

In this instance the receipts or bills of lading of all the potatoes which reached the place of destination were there delivered up to the agent of the railroad company from whose custody the property was taken by the consignees. They were not produced at the trial, nor were their contents proved. The shipping bills or notes purport to have been requests of the persons subscribing them that the defendant receive the property addressed to the consignees, "to be sent by the said company subject to the terms and conditions stated above and on the other side, and which are agreed to by this shipping note delivered to the company as the basis upon which their receipt is to be given for said property." Shanley & Co. had no knowledge of the making of the shipping bills, nor did they authorize the execution of them, unless it came within the power incident to the direction given to deliver the property for shipment. It seems that Shanley & Co. purchased the potatoes, and directed their delivery at the defendant's stations by the persons who delivered or caused them to be taken there for such purpose.

Ordinarily, a person authorized to deliver and delivering the property of another to a common carrier for shipment may by the latter be treated as having authority to stipulate for and accept the terms of affreightment, and, as against the carrier, the owner is bound by them. *Nelson v. Railroad Co.*, 48 N. Y. 498; *Shelton v. Dispatch T. Co.*, 59 N. Y. 258. The limitation of the common-law responsibility of the defendant depended upon a special contract to that effect; and the burden of proving such contract was with the defendant. To do this the shipping bills taken and retained by it were produced. On the back of each of these were twenty one numbered provisions in fine print. Of these bills it may be assumed that Shanley & Co. had no personal knowledge until they were produced at the trial. They were upon printed blanks kept for the purpose by the defendant, and the referee found that they were made "in conformity with the general requirement or custom of the defendant on the receipt of goods for transportation;" and that Shanley & Co. "then knew it to be the universal custom of railroad companies, so far as their experience went, to require shipping bills to be executed by the shipper, containing the terms and conditions of shipment, upon the delivery of potatoes or similar goods to such companies for



transportation." It appears by those bills that the giving of receipts by the defendant's agent was then contemplated. And the referee found that the defendant's receipts or bills of lading, containing some terms and conditions for the transportation of the potatoes, were so given, but that no evidence was offered to prove what those terms and conditions were. The contents of those papers constituted in part, at least, the contract, and for the complete proof of it they would seem to have been essential. It evidently was for that reason that defendant's counsel requested the referee to find, which he did, that the contracts executed and delivered by the defendant at the time of the shipment of the potatoes had not been proved, and thereupon insisted that without proving them the plaintiffs were not entitled to recover. There is no legal presumption to the prejudice of the plaintiffs arising out of the fact that receipts or bills of lading were given, so far as relates to the contract. Those papers had, however, been delivered up at the place and time of the receipt of the property, and it may be assumed that they were accessible to the defendant.

The question arises as to the effect of the terms and conditions of the shipping bills upon the rights of the plaintiffs, and to what extent they operate to relieve the defendant from its common-law duty; and this may depend somewhat upon the authority which the defendant had the right to treat as possessed by the persons signing those bills at the time they were made. Inasmuch as no conditions were mentioned in connection with the information given by the freight agent of the through rates for which the defendant would transport the property, it may be that Shanley & Co. supposed that the common-law duty would be assumed by the defendant as such carrier; and that would have been the situation if no special terms had been provided for when the property was delivered to the defendant. And, although Shanley & Co. had not undertaken to furnish the property for shipment, they had the right to assume, unless advised to the contrary, that when delivered for that purpose it was received pursuant to the arrangement before then made, so far as related to the rates and through transportation; and, consistently only with such previous understanding or agreement, the defendant was permitted to treat it as within the authority of the persons who delivered the potatoes to make or accept stipulations or conditions

for the reception and carriage of the property by it, and beyond that the owners were not necessarily bound by any thing contained in the shipping bills, so far as it was dependent merely upon the presumption of authority of the persons executing them. Treating, as we do upon the facts found, the defendant's contract as one for transportation of the property to the place of destination, the provisions and conditions upon the shipping bills, so far as they may be otherwise construed, are not applicable to the shipments in question. *Riley v. Railroad Co.*, 34 Hun, 97; *Babcock v. Railway Co.*, 49 N. Y. 491; *Condict v. Railway Co.*, 54 N. Y. 500. The conclusion was permitted that not only did *Shanley & Co.* have no knowledge of the shipping bills, but that the receipts or bills of lading did not come to them until the potatoes were shipped and had gone forward. They were, therefore, not necessarily charged with any of the terms and conditions (whatever they were) of the bills of lading other than such as the defendant was at liberty to treat as within the authority of the persons receiving them to accept in behalf of the owners of the property. *Coffin v. Railroad Co.*, 64 Barb. 379; 56 N. Y. 632; *Bostwick v. Railroad Co.*, 45 N. Y. 712; *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90; *Guillaume v. Transportation Co.*, 100 N. Y. 491; 3 N. E. Rep'r, 489; *Swift v. Steamship Co.*, 106 N. Y. 206; 12 N. E. Rep'r, 583; *Park v. Preston*, 108 N. Y. 434; 15 N. E. Rep'r, 705. And to that extent, and that only, the terms and conditions of the shipping bills, so far as reasonable and applicable to through transportation of the property by the defendant, must for that purpose be deemed within the contract. But limitation of the common-law liability of the carrier is dependent upon language in the contract fairly requiring such construction without the aid of implication. The provisions to the effect that the defendant would not be responsible for the delay in the transit of the property did not have the effect to relieve it from the consequences of delay occasioned by its negligence, as exemption from liability for that cause was not expressed in the contract. *Maguin v. Dinsmore*, 56 N. Y. 168; *Maynard v. Railroad Co.*, 71 N. Y. 180; *Nicholas v. Railroad Co.*, 89 N. Y. 370. There was evidence upon the subject, and by it was supported the finding of the referee, that the loss suffered and the damages sustained by the plaintiffs' assignors were

caused by the defendant's negligence in transporting the potatoes.

Among the terms and conditions on the back of the shipping bills was one numbered twelve, which provided "that no claim for damages to, loss of or detention of any goods for which this company is accountable, shall be allowed unless notice in writing and particulars of the claim for said loss, damage or detention are given to station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect to which said claim is made are delivered." No such notice was given. The referee refused to give effect to it upon the request of the defendant's counsel, and exception was taken. The view of the referee was that this provision was not applicable to shipments beyond the terminus of the defendant's railway. The place of delivery was East St. Louis. And the same reason for the requirement of the notice when the place of delivery by the defendant is beyond its own line of road exists for it as when such place is upon its railway. The purpose of the notice evidently was to enable the carrier to investigate the nature, cause and extent of the injury or damages claimed, with a view to the means of the protection which such opportunity may afford. It is the accountability of the defendant for damages that renders the notice essential, and by the terms of the clause in question no other condition is required. It is true that other clauses are to the effect that the defendant should not be responsible beyond its own railway for goods passing over it, and from it onto other roads, but it is contemplated that its cars containing goods might go forward on connecting railroads to the place of destination. It is not seen how that fact can qualify or limit the purpose of the notice. The delivery in view is to the consignee. This can be done only at the place to which the goods are consigned. Before delivery there, he may not be supposed to have either the opportunity or means of giving the notice.

It is legitimate for a common carrier, by contract with the shipper, to provide for a reasonable time within which notice of claim for loss or damage shall be given as a condition of liability, and the manner of giving it. *Express Co. v. Caldwell*, 21 Wall. 264; *Express Co. v. Hunicutt*, 54 Miss. 566; *Lewis v. Railway Co.*, 5 Hurl & N. 867. In those cases the notices pro-

vided for were held to be reasonable. And that question is an open one for consideration. *Westcott v. Fargo*, 61 N. Y. 542, 551; *Express Co. v. Reagan*, 29 Ind. 21. In this present case each car contained four hundred bushels and upward of potatoes. The time in which the condition required notice to be given might not include more than twelve business hours to ascertain the requisite particulars of the claim for the purpose of the notice. It is easy to see that the specified time of thirty-six hours would be inadequate to the necessity that might exist in a case like the one under consideration. The conclusion was permitted that, in view of the character and extent of the property, and the nature of the claim for damages which might and did arise, the time specified within which to give notice, with particulars, was quite unreasonable; and, therefore, and for that reason, the condition in that respect was inapplicable to the shipments in question, and the failure to give such notice was no bar to the remedy. This view renders it unnecessary, in the consideration of the effect of such condition, to refer further to the circumstances under which the shipping bills were made, in view of the fact that it does not appear that the condition was in the bill of lading. No other question seems to require the expression of consideration. The judgment should be affirmed. All concur, Follett, C. J., in result.

**1. Carriers — contract of shipment — authority of agent — when terms of bill of lading not binding.**—The foregoing case has been the subject of criticism *pro* and *con*. It does not, however, advance any new doctrines. It expressly recognizes the doctrine that "as a general rule, the bill of lading given by a carrier to and accepted by the shipper of goods contains the contract for carriage, and, in the absence of fraud, imposition or mistake, the parties are concluded by its terms as there expressed." *Long v. Railroad Co.*, 50 N. Y. 76; *Snow v. Railroad Co.*, 109 Ind. 422; *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 684. Also the doctrine that "a person authorized to deliver and delivering the property of another to a common carrier for shipment may by the latter be treated as having authority to stipulate for and accept the terms of affreightment, and, as against the carrier, the owner is bound by them." *Nelson v. Hudson Riv. R. Co.*, 48 N. Y. 498; *Shelton v. Merchants' Despatch Trans. Co.*, 59 N. Y. 258; *Squire v. New York Central R. Co.*, 98 Mass. 239; *Robinson v. Merchants' Despatch Trans. Co.*, 45 Iowa, 470; *Christenson v. Am. Express Co.*, 15 Minn. 270; *Hutch. Carriers*, § 265.

In the principal case, the referee had found, as a matter of fact, that, prior to the shipment of the potatoes, an agreement had been made between the plain-

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\* Reported in 28 N. E. Rep'r, 394; 127 N. Y. 438.

tiff and the defendant, whereby the latter undertook to transport the potatoes through to their destination, in car-load lots, at a specified price per hundred. The court say that this conclusion was not free from doubt, but was justified by the evidence. Assuming that such a prior arrangement had been made, then when the potatoes were afterward delivered for shipment by the agents of the plaintiffs, the presumption was that they were delivered pursuant to the previous arrangement, and there was no presumption that such agents had authority to bind the plaintiffs by any modification of such arrangement. In deciding to this effect the court was simply following its previous decisions. See *Park v. Preston*, 108 N. Y. 484; *Swift v. Steamship Co.*, 106 N. Y. 206; *Guillaume v. Transportation Co.*, 100 N. Y. 491; *Bostwick v. Railroad Co.*, 45 N. Y. 712.

It was not denied that plaintiff's agents who delivered the potatoes had authority to bind them by consenting to such conditions as were usual and proper in connection with a contract for through transportation. But such agents had no more presumptive authority to do away with the contract or arrangement for through transportation than they had to agree to a different rate.

The court had no power to review conclusions of facts upon the evidence, and it can hardly be said that there was no evidence to justify the finding that a contract for through transportation was made. In *Condict v. Grand Trunk Ry. Co.*, 54 N. Y. 500, where goods were received in Canada marked for Chicago and a bill of lading given, specifying that they were to be sent to and delivered in Chicago at a specified price per hundred pounds, it was held that such facts clearly showed a contract for the transportation of the goods to Chicago. In *Hutchinson on Carriers* it is said: "Where the contract is express, no resort need, of course, be had to circumstantial evidence; but where it is not express and the contract becomes a question of fact for the jury, then all the surrounding circumstances become important. In such a case the fact that the goods were marked for through transportation, that a through rate was paid, that the goods were to be carried through in a designated car, that there was a usage for through carriage, that the caption of the bill of lading or receipt purports a through contract, and any other fact throwing light upon the intention, may properly be considered. And while the existence of any single fact of this kind may not be in all cases sufficient to establish conclusively that such was the contract, it may always be shown to the jury, as conducive to that end." *Hutch. Carriers*, § 152, citing *Quimby v. Vanderbilt*, 17 N. Y. 306; *Root v. Railroad Co.*, 45 N. Y. 524; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8; *Candee v. Railroad Co.*, 21 Wis. 582; *Evansville, etc., R. Co. v. Androscoggin Mills*, 23 Wall. 594; *Robinson v. Merchants' Despatch Trans. Co.*, 45 Iowa, 470; *Hill Mfg. Co. v. Railroad Co.*, 104 Mass. 122; *Gray v. Jackson*, 51 N. H. 9.

In the principal case plaintiffs inquired by letter of defendant's assistant general freight agent the lowest rates for shipment in car-load lots of potatoes from Prescott, Canada, to East St. Louis, Ill. The agent replied, giving rates for full car-load lots from Prescott to East St. Louis, and requesting notice of acceptance before shipment. Plaintiffs accepted the terms, presumably by letter, and afterward caused the potatoes to be delivered. According to the authorities referred to, these facts, and especially the through rates and the

stipulation for car-load lots, would justify the conclusion that the parties had in mind a contract for through shipment.

A case presenting much similarity to the principal case is found in *Pereira v. Central Pac. R. Co.*, 66 Cal. 92. The plaintiff had some conversation with the general freight agent of defendant in regard to the shipment of fruit from California to New York, informing him that it would be necessary that it should be carried to its destination in ten or twelve days. Plaintiff inquired for rates by passenger train, but was informed that it could be sent by passenger train to Omaha only and thence by fast freight, which would ensure its delivery within the time required. The agent promised information as to rates within a few days and subsequently wrote plaintiff as follows: "I am in receipt of your favor of November 10, and have this day telegraphed you as follows: Fruit Stockton to New York, to Omaha by passenger train, thence by freight, ten hundred and seventy-five (\$1075), cy. per car. Freight must be prepaid or else guaranteed by responsible party." Plaintiff accepted the terms and shipped two car-loads at different times. The first lot was substantially ruined by delay and the second never reached its destination at all. The suit was for the loss sustained. When the fruit was delivered for transportation, the defendant gave to plaintiff's teamster receipts with various conditions, the effect of which was that the defendant only undertook to carry to the end of its line and there deliver to the succeeding carrier, and it did not undertake to carry by any particular train nor in any particular time. When these receipts were delivered to the plaintiff, or what knowledge he had of them, does not appear from the report. It was held that the trial court properly left it for the jury to say whether the shipments were under a contract for through transportation according to the terms of the negotiations and letters, or whether the terms and conditions stated in the receipts constituted the contract between the parties. A verdict and judgment for the plaintiff was affirmed. The court held that the evidence was sufficient to support a verdict that the defendant undertook to carry the fruit through to New York, and was consequently liable for delay and loss beyond its own lines. See, also, *Railroad Co. v. Pratt*, 23 Wall. 128.

A case also bearing much resemblance to the principal case is to be found in *Harris v. Grand Trunk R. Co.*, 15 R. I. 871. The suit was for the non-delivery of peas shipped to the plaintiff at Providence, R. I., from Newcastle, Canada. The bill of lading seems to have been similar to the one in the principal case, and contained a provision to the effect that where goods were addressed to consignees beyond places at which the defendant had stations, the delivery of the goods by the company should be considered complete, and all responsibility of the defendant should cease when the connecting carrier had received notice that the defendant was prepared to deliver to such carrier the goods for further conveyance. The plaintiff relied upon a special contract for through shipment, the only evidence of which was a letter written to him by an agent of the defendant about two months before the shipment of the peas in question, as follows: "I have been notified of the arrangement for quoting Boston rates to Providence, R. I., via Northern N. H. & W. & N. R. R., and have so advised Mr. Lockhart. We can now take peas in car-load lots, Newcastle to Providence, R. I., by the above-named route at 25c. per 100 lbs." Upon

the effect of this evidence the court says: "In *Knight v. Providence & W. R. Co.*, 18 R. I. 572, 574, this court recognized as the rule of law that where a carrier receives goods marked to a place beyond the terminus of its own line without more, or without any further or special contract, he is only liable to carry safely to the end of his own route, and deliver to the next carrier on the usual route. In view of this rule, and in the absence of testimony to the contrary, we think that the letter referred to is not to be considered as an offer to *carry* the peas from Newcastle to Providence, but only to *take* them, and that, by its terms, it cannot be construed to mean more than an offer by the defendant to take them for carriage to the end of its own route, and there deliver them to the next carrier on the route named, to be forwarded by such carrier. The plaintiff did not testify that the bill of lading was any surprise to him, nor did he produce his agent who shipped the peas that the agent did not know perfectly well the terms of the bill of lading when he shipped them under it."

HOSPES ET AL. V. NORTHWESTERN MANUF'G & CAR CO. (MINNESOTA THRESHER MANUF'G CO., INTERVENER. TWO CASES.)

(Supreme Court of Minnesota, Jan. 18, 1892.)

1. CORPORATIONS. LIABILITY OF STOCKHOLDERS TO CREDITORS, HOW ENFORCED. The equitable right of creditors of a corporation to compel the holders to pay for "bonus" stock may be enforced in a sequestration proceeding under chapter 76, General Statutes upon the complaint of any interested creditor who has become a party to the proceeding.

2. THE "TRUST FUND" DOCTRINE EXAMINED AND CRITICISED. The so-called "trust fund" doctrine that "the capital of a corporation is a trust fund for the payment of its debts" considered and criticised.

3. The capital of a corporation is its own property, which it may use and dispose of (if not prohibited by its charter), the same as a natural person. It is not held in trust for creditors, except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of corporate debts, and that, as in the case of a natural person, any disposition of it in fraud of creditors is void; and in this respect there is no distinction between unpaid capital and paid capital, between "stock subscriptions" and any other assets of the corporation.

4. "BONUS" STOCK. LIABILITY OF HOLDER RESTS UPON FRAUD. The right of creditors to compel the holders of "bonus" stock to pay for it contrary to their actual agreement with the corporation rests neither on implied contract nor upon any "trust fund" doctrine, but upon the ground of fraud.

5. The fraud in such case, consists in the misrepresentation as to the actual amount of capital, upon the faith of which persons have dealt with the corporation and given it credit.

6. WHAT CREDITORS MAY ENFORCE THE LIABILITY. PRIOR AND SUBSEQUENT CREDITORS. Hence it is only those creditors who have relied on, or who can fairly be presumed to have relied on, the stock representing actual

capital, in whose favor equity will enforce payment of such stock. Consequently payment can never be enforced in favor of one who became a creditor before the "bonus" stock was issued.

7. It is not necessary that a "subsequent" creditor should have alleged that when he dealt with the corporation he believed that the stock had been paid for, and that he gave credit on the faith of it. If in fact the creditor had knowledge of the arrangement by which the "bonus" stock was issued, that is a matter of defense to be set up by the defendant stockholder.

8. RIGHT OF ASSIGNEE OF CORPORATE CREDITOR TO ENFORCE SUCH LIABILITY. Where a creditor asks for such relief against a stockholder he should show his own equities entitling him to such relief. Hence, when it appears that he is not the original creditor, but had purchased the claims after the corporation had become insolvent, and its affairs had been placed in the hands of a receiver, he should state what he paid for the claims, or at least show that he paid a substantial consideration for them. Equity will not grant such relief for the benefit of those who have bought up claims against an insolvent corporation for a nominal consideration for the purpose of speculating on the liability of stockholders.

9. WHEN ACTION ACCRUES AGAINST HOLDER OF BONUS STOCK. The right of action in favor of creditors against the holders of such bonus stock does not accrue until the corporation becomes insolvent.

**A**PPEAL from district court, Washington county. Sequestration proceedings by E. L. Hospes & Co. against the Northwestern Manufacturing and Car Company. The Minnesota Thresher Manufacturing Company intervened and filed a complaint against George R. Finch and others, stockholders in the Northwestern Manufacturing and Car Company. From an order overruling demurrer to the intervenor's supplemental complaint George R. Finch, the St. Paul Trust Company, executor, and others, appeal. Reversed.

*Horace G. Stone* for appellants George R. Finch et al. *Harvey Officer* for appellant St. Paul Trust Company. *Flan-drau, Squires & Cutocheon* and *Davis, Kellogg & Severance* for respondent.

**MITCHELL, J.** This appeal is from an order overruling a demurrer to the so-called "supplemental complaint" of the Minnesota Thresher Manufacturing Company. The Northwestern Manufacturing and Car Company was a manufacturing corporation organized in May, 1882. Upon the complaint of a judgment creditor (Hospes & Co.), after return of execution unsatisfied, judgment was rendered in May, 1884, sequestering all its prop-



erty, things in action and effects, and appointing a receiver of the same. This receivership still continues, the affairs of the corporation being not yet fully administered; but it appears that it is hopelessly insolvent, and that all the assets that have come into the hands of the receiver will not be sufficient to pay any considerable part of the debts. The Minnesota Thresher Manufacturing Company, a corporation organized in November, 1884, as creditor, became a party to the sequestration proceeding, and proved its claims against the insolvent corporation. In October, 1889, in behalf of itself and all other creditors who have exhibited their claims, it filed this complaint against certain stockholders (these appellants) of the car company in pursuance of an order of court allowing it to do so, and requiring those thus impleaded to appear and answer the complaint. The object is to recover from these stockholders the amount of certain stock held by them, but alleged never to have been paid for. What was said in *Meagher Case*, 50 N. W. Rep'r, 1114 (just decided), is equally applicable here as to the right to enforce such a liability in the sequestration proceeding upon the petition or complaint of creditors who have become parties to it. There is nothing in this practice inconsistent with what was decided in *Thresher Co. v. Langdon*, 44 Minn. 37; 46 N. W. Rep'r, 310. The complaint is not the commencement of an independent action by creditors in their own behalf antagonistic to the rights of the receiver, but is filed in the sequestration proceeding itself, and in aid of it.

The principal question in the case is whether the complaint states facts showing that the thresher company, as creditor, is entitled to the relief prayed for; or, in other words, states a cause of action. Briefly stated, the allegations of the complaint are that on May 10, 1882, Seymour, Sabin & Co. owned property of the value of several million dollars, and a business then supposed to be profitable. That in order to continue and enlarge this business the parties interested in Seymour, Sabin & Co., with others, organized the car company, to which was sold the greater part of the assets of Seymour, Sabin & Co. at a valuation of \$2,267,000, in payment of which there were issued to Seymour, Sabin & Co. shares of the preferred stock of the car company of the par value of \$2,267,000, it being then and there agreed by both parties that this stock was in full payment of the property

thus purchased. It is further alleged that the stockholders of Seymour, Sabin & Co., and the other persons who had agreed to become stockholders in the car company, were then desirous of issuing to themselves, and obtaining for their own benefit, a large amount of common stock of the car company, "without paying therefor, and without incurring any liability thereon or to pay therefor;" and for that purpose, and "in order to evade and set at naught the laws of this state," they caused Seymour, Sabin & Co. to subscribe for and agree to take common stock of the car company of the par value of \$1,500,000. That Seymour, Sabin & Co. thereupon subscribed for that amount of the common stock, but never paid therefor any consideration whatever, either in money or property. That thereafter these persons caused this stock to be issued to D. M. Sabin as trustee, to be by him distributed among them. That it was so distributed without receipt by him or the car company from any one of any consideration whatever, but was given by the car company and received by these parties entirely "gratuitously." The car company was, at this time, free from debt, but afterward became indebted to various persons for about \$3,000,000. The thrasher company, incorporated after the insolvency and receivership of the car company, for the purpose of securing possession of its assets, property and business, and therewith engaging in and continuing the same kind of manufacturing, prior to October 27, 1887, purchased and became the owner of unsecured claims against the car company, "bona fide, and for a valuable consideration," to the aggregate amount of \$1,703,000. As creditor, standing on the purchase of these debts, which were contracted after the issue of this "bonus" stock, the thrasher company files this complaint to recover the par value of the stock as never having been paid for. The complaint does not allege what the consideration of these debts was, nor to whom originally owing, nor what the intervener paid for them, nor whether any of the original creditors trusted the car company on the faith of the bonus stock having been paid for. Neither does it allege that either the thrasher company or its assignors were ignorant of the bonus issue of stock, nor that they or any of them were deceived or damaged in fact by such issue, nor that the bonus stock was of any value. Neither is there any traversable allegation of any actual fraud or intent to deceive or injure

creditors. A desire to get something without paying for it, and actually getting it, is not fraudulent or unlawful if the donor consents, and no one else is injured by it; and the general allegation that it was done "in order to evade and set at naught the laws of the state" of itself amounts to nothing but a mere conclusion of law. As a creditors' bill, in the ordinary sense, the complaint is manifestly insufficient. The thresher company, however, plants itself upon the so-called "trust fund" doctrine that the capital stock of a corporation is a trust fund for the payment of its debts, its contention being that such a "bonus" issue of stock creates, in case of the subsequent insolvency of the corporation, a liability on part of the stockholder in favor of creditors to pay for it, notwithstanding his contract with the corporation to the contrary.

This "trust-fund" doctrine, commonly called the "American doctrine," has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two-thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding bill-holders. Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders—a proposition that is sound upon the plainest principles of common honesty. In *Fogg v. Blair*, 133 U. S. 541; 10 Sup. Ct. Rep'r, 338, it is said that this is all the doctrine means. The expression used in *Wood v. Dummer* has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not

held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further. This is well illustrated and clearly announced in the case of *Graham v. Railway Co.*, 102 U. S. 148. That was a creditor's suit to reach a piece of real estate on the ground that it had been conveyed by the corporation fraudulently for a wholly inadequate consideration. The trust-fund doctrine was invoked by a subsequent creditor, and it was claimed that, as the trust had been violated, the deed should be set aside. If the premise was correct that the corporation held it in trust for creditors, the conclusion was inevitable; but the court denied the premise, saying that a corporation is in law as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same; and that there is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors any more than a like disposal by an individual; that the same principles of law apply to each. That the phrase that "the capital of a corporation is a trust fund for the payment of its creditors" is misleading, if not inaccurate, is illustrated by the character of the actions that are frequently mistakenly instituted on the strength of it. For example, in the case of *Railroad Co. v. Ham*, 114 U. S. 587; 5 Sup. Ct. Rep'r, 1081, two roads had been consolidated, the new company acquiring the property of the old ones. A creditor of one of the old companies, on the strength of the "trust-fund" doctrine, claimed a lien on its property in the hands of the new corporation. If this property was impressed with a trust in favor of creditors in the hands of the old company, it would logically follow that it would continue so in the hands of the new one. But the court denied the relief, and, in

giving its construction of the "trust-fund" doctrine, said: "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among stockholders. It is also true, in the case of a corporation as in the case of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void." This is probably what is meant when it is said in some cases, as in *Clark v. Bever*, 139 U. S. 110; 11 Sup. Ct. Rep'r, 468, that the capital of a corporation is a trust fund *sub modo*. If so, no one will dispute it. But it means very little, for the same thing could be truthfully said of the property of an individual or a partnership. And obviously it would make no difference whether the disposition of the corporate property is to a stranger or to a stockholder, except that, of course, the latter could not be an innocent purchaser.

There is also much confusion in regard to what the "trust-fund" doctrine applies. Some cases seem to hold that unpaid subscribed capital is a trust fund, while other assets are not — that is, so long as the subscription is unpaid, it is held in trust by the corporation, but, when once paid in, it ceases to be a trust fund; while other cases hold that, paid or unpaid, it is all a trust fund. The first seems to be the rule laid down in *Sawyer v. Hoag*, 17 Wall. 610, in which the "trust-fund" doctrine was first squarely announced by that court with all the vigor and force characteristic of the great jurist who wrote the opinion. In that case a stockholder in an insurance company had given his note, as the court found the fact to be, for eighty-five per cent of his subscription to the stock of the company. After the company had become bankrupt, and the stockholder knew the fact he bought up a claim against the company for one-third its face, and in a suit by the assignee in bankruptcy on his note set up this claim as an offset. That this would have been a fraud on the bankrupt act, and at least a moral fraud on policy-holders, is quite apparent without invoking the "trust-fund" doctrine; and, if the note for unpaid stock was a trust fund, there could have been no offset, whether the company was solvent or insolvent. In the opinion it is said

that, "if the subscription had been paid by the note or otherwise, the note ceased thereby to be a trust fund to which creditors can look, and became ordinary assets, with which directors may deal as they choose." But in *Upton v. Tribilcock*, 91 U. S. 45, it is stated: "The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away." While in *Sanger v. Upton*, 9 U. S. 56, it is said: "When debts are incurred a contract arises with the creditors that it (the capital) shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied." And in the same connection it is distinctly stated that there is no difference between assets paid in and subscriptions; that "unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it; that creditors have the same right to look to it as to any thing else, and the same right to insist upon its payment as upon the payment of any other debt due the company; that, as regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." This language is quoted and approved in *County of Morgan v. Allen*, 103 U. S. 508. It would seem clear that this is the correct statement of the law.

The capital (not the mere share certificates) means all the assets, however invested. If a subscriber gives his note for his stock, that note is no more and no less a trust fund than the money would have been if he had paid cash down. Capital cannot change from a trust to not a trust by a mere change of form. It is either all a trust or all not a trust, and the "trust-fund" rule, whatever that be, must apply to all alike, and in the same way. If the assets of a corporation are given back to stockholders, the result is the same as if the shares had been issued wholly or partly as a bonus. The latter is merely a short cut to the same result. So with dividends paid out of the capital, voluntary conveyances, stock paid in overvalued property; all are forms of one and the same thing, all reaching the same result (a disposition of corporate assets), which may or may not be a fraud on creditors, depending on circumstances. This much being once settled, the solution of the question when a subsequent creditor can insist on payment of stock issued as paid up, but not in fact paid for, or not paid for at par, becomes, as we shall presently see, comparatively simple.

Another proposition which we think must be sound is that creditors cannot recover on the ground of contract when the corporation could not. Their right to recover in such cases must rest on the ground that the acts of the stockholders with reference to the corporate capital constitutes a fraud on their rights. We have here a case where the contract between the corporation and the takers of the shares was specific that the shares should not be paid for. Therefore, unlike many of the cases cited, there is no ground for implying a promise to pay for them. The parties have explicitly agreed that there shall be no such implication by agreeing that the stock shall not be paid for. In such a case the creditors undoubtedly may have rights superior to the corporation, but these rights cannot rest on the implication that the shareholder agreed to do something directly contrary to his real agreement, but must be based on tort or fraud, actual or presumed. In England, since the act of 1867, there is an implied contract created by statute that "every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for every one would be advised of its provisions, and could conduct himself accordingly. And in view of the fact that "watered" and "bonus" stock is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the legislature, and not for the courts. We have no such statute; and, even if the law of 1873, under which the car company was organized, impliedly forbids the issue of stock not paid for, the result might be that such issue would be void as *ultra vires*, and might be canceled, but such a prohibition would not of itself be sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock.

It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of "bonus" stock pay for it contrary to his actual contract with the corporation. Thus no such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock. *First Nat. Bank v. Gustin M. C. Min. Co.*, 42 Minn. 327; 44 N. W. Rep'r, 198; *Coit*

v. Amalgamating Co., 119 U. S. 347; 7 Sup. Ct. Rep'r, 231; *Handley v. Stutz*, 139 U. S. 435; 11 Sup. Ct. Rep'r, 530. It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the "bonus" stock was issued, for a man cannot be defrauded by that which he knows when he acts. *First Nat. Bank v. Gustin M. C. Min. Co.*, *supra*. It has also been held not to exist where stock has been issued and turned out at its full market value to pay corporate debts. *Clark v. Bever*, *supra*. The same has been held to be the case where an active corporation, whose original capital has been impaired, for the purpose of recuperating itself issues new stock, and sells it on the market for the best price obtainable, but for less than par (*Handley v. Stutz*, *supra*); although it is difficult to perceive, in the absence of a statute authorizing such a thing (of which every one dealing with the corporations is bound to take notice), any difference between the original stock of a new corporation and additional stock issued by a "going concern." It is difficult, if not impossible, to explain or reconcile these cases upon the "trust-fund" doctrine, or in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock."

It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stock-



holder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of "bonus" stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the "trust-fund" doctrine has involved it; and we think that, even when the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule.

It is urged, however, that if fraud be the basis of the stockholders' liability in such cases, the creditor should affirmatively allege that he believed that the bonus stock had been paid for, and represented so much actual capital, and that he gave credit to the incorporation on the faith of it; and it is also argued that, while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and that in pleadings no presumptions of fact are indulged in. This position is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon the amount of its professed and supposed capital, and every one who deals with it does so upon the faith of that standing and reputation, although as a matter of fact, he may have no personal knowledge of the amount of its professed capital, and in a majority of cases knows nothing about the shares of stock held by any particular stockholder, or, if so, what was paid for them. Hence, in a suit by such creditor against the holders of "bonus" stock, he could not truthfully allege, and could not affirmatively prove, that he believed that the defendants' stock had been paid for, and that he gave the corporation credit on the faith of it, although, as a matter of fact, he actually gave the credit on the faith of the financial standing of the corporation, which was based upon its apparent and professed amount of capital. The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and

effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; and that, if the fact was that he dealt with the corporation with knowledge of the arrangement by which the "bonus" stock was issued, this is a matter of defense. *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427; 47 N. W. Rep'r, 726. Counsel cites *Fogg v. Blair*, *supra*, to the proposition that the complaint should have stated that this stock had some value; but that case is not in point, for the plaintiff there was a prior creditor; and, as his debt could not have been contracted on the faith of stock not then issued, he could only maintain his action, if at all, by alleging that the corporation parted with something of value.

In one respect, however, we think the complaint is clearly insufficient. The thrasher company is here asking the interposition of the court to aid in enforcing an equity in favor of creditors against the stockholders by declaring them liable to pay for this stock contrary to their actual contract with the corporation. While the proceeding is not, strictly speaking, an equitable action, yet the relief asked is equitable in its nature. Under such circumstances, it was incumbent upon the thrasher company to show its own equities, and that it was in a position to demand such relief. It was not the original creditor of the car company, but the assignee of the original creditors. By that purchase it, of course, succeeded to whatever strictly legal rights its assignors had; but it is not rights of that kind which it is here seeking to enforce. Under such circumstances, we think it was incumbent upon it to state what it paid for the claims, or at least to show that it paid a substantial, and not a mere nominal consideration. The only allegation is that it paid "a valuable consideration." This might have been only \$1. It appears that it bought the claims after the car company had become insolvent, and its affairs were in the hands of a receiver; also that the indebtedness of that company amounted to about \$3,000,000, and that there were not corporate assets enough to pay any considerable part of it. The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insol-

vent corporation. If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for. It would say to them, "We will not create and enforce an equity for the benefit of any such speculation." Counsel for respondent suggests that the thrasher company is but an organization of the original creditors, who formed it, and pooled their claims, so as to save something out of the wreck of the car company; but nothing of the kind is alleged. On this ground the demurrer should have been sustained.

In view of further proceedings it may be proper to say that in our opinion there is nothing in the position that the right of recovery against the stockholders was barred by the statute of limitation. The argument in support of the proposition all rests upon the false premise that the cause of action accrued in May, 1882, when the bonus stock was issued. The corporation never had any cause of action against these defendants. As between them and the company, the agreement for the issue of the stock was valid. The creditors are not here seeking to enforce a right of action acquired through or from the corporation, but one that accrued directly to themselves, or for their benefit, and that did not accrue at least until the corporation became insolvent, in May, 1884.

Counsel for the St. Paul Trust Company stated that, if the court should reverse the order appealed from on any of the grounds urged by the other appellants, it would not be necessary for us to consider any of the assignments of error peculiar to his appeal; but, as we reverse upon a ground that may be remedied by amendment, we deem it proper to say that, in our opinion, the claim against the Kittson estate is a "contingent" claim, within the meaning of the General Statutes of 1878, chapter 53.

Order reversed.\*

Gilfillan, C. J., took no part.

**Corporations — unpaid subscriptions as a trust fund for creditors.**—The questions involved in the foregoing case are fully discussed in note to *Handley v. Stutz*, 4 Am. R. R. & Corp. Rep. 482.

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\* Reported in 50 N. W. Rep'r. 1117.

## CHARLOTTE, C. &amp; A. R. Co. v. GIBBES, COUNTY TREASURER.

(Supreme Court of the United States, Jan. 4, 1882.)

1. RAILROAD CORPORATIONS. POWER TO COMPEL THEM TO PAY EXPENSES OF RAILROAD COMMISSIONERS. CONSTITUTIONAL LAW. Private corporations are "persons" within the constitution of the United States fourteenth amendment, section 1, prohibiting the states from depriving any "person" of property without due process of law, etc.

2. The provisions of General Statutes of South Carolina, 1882, chapter 40, that the entire expenses of the railroad commission, which is thereby created and invested with general supervision of all railroads in the state, "shall be borne by the several corporations owning or operating railroads" within the state "according to their gross income proportioned to the number of miles in the state," is not in conflict with the constitution of the United States, fourteenth amendment, section 1, forbidding deprivation of property without due process of law, and securing to every person equal protection of the laws, as the business of such corporations is affected with a public use, and subject to legislative regulation, and the regulations imposed are within the power of the state to prescribe, and the exercise of the duties of the commissioners is beneficial to the public, and also to the railroad corporations.

**I**N error to the supreme court of the state of South Carolina. Suit by the Charlotte, Columbia and Augusta Railroad Company against Wade Hampton Gibbes, treasurer, etc., to determine the validity of a tax. Plaintiff brings error to a judgment of the supreme court of the state of South Carolina affirming a judgment of the court of common pleas for Richland county dismissing its complaint. Affirmed.

## STATEMENT BY MR. JUSTICE FIELD.

The plaintiff below and in error, the Charlotte, Columbia and Augusta Railroad Company, is a corporation existing under the laws of the states of North Carolina, South Carolina and Georgia. Its road and other property are situated in the county of Richmond, Ga., and in the counties of Aiken, Edgefield, Lexington, Richland, Fairfield, Chester and York, S. C., and in the county of Mecklenberg, N. C.

By the legislature of South Carolina a general railroad law was passed in 1878, prescribing numerous provisions for the regulation and government of railroads in that state. That law, as amended in some particulars, was incorporated as chapter 40 in the General Statutes of the state in 1882. It provides for the

appointment by the governor of three railroad commissioners, charged to see to the enforcement of its various provisions, each of whom is to receive a salary of \$2,000 a year, to be paid out of the treasury of the state in the manner provided by law for the salaries of other state officers; and also that "the entire expenses of the railroad commission, including all salaries and expenses of every kind, shall be borne by the several corporations owning or operating railroads within this state according to their gross income, proportioned to the number of miles in the state, to be proportioned by the comptroller-general of the state, who on or before the 1st day of October in each and every year shall assess upon each and every corporation its just proportion of such expense in proportion to its said gross income for the current year ending on the 30th day of June next preceding that on which the said assessment is made; and the said assessment shall be charged up against the said corporations, respectively, under the order and direction of the comptroller-general, and shall be collected by the several county treasurers in the manner provided by law for the collection of taxes from such corporations, and shall be paid by the said county treasurer as collected into the treasury of the state in like manner as other taxes collected by them for the state."

For the fiscal year of 1883 the plaintiff was charged on the books of the county treasurer of Richland county, in South Carolina, with the sum of \$987.75, being the amount assessed as a tax against that company as its entire proportion of the salaries and expenses of the railroad commissioners of the state, and being its proportion for all the counties.

The plaintiff, deeming the same to be unjust and illegal, paid the same under protest, and instituted the present suit, under a law of the state, to obtain a judicial determination that it was wrongfully and illegally collected, and the certificate of the court that it should be refunded.

In its complaint it alleges that the tax is illegal because assessed in proportion to the gross income of the plaintiff, instead of being in proportion to the value of its property; and because its imposition is in conflict with the constitution of the state in several particulars mentioned; and also in violation of the fourteenth amendment of the constitution of the United States, by which each

state is forbidden to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, in this: that the act and amendments authorizing it require railroad companies of the state, exclusively, to pay the salaries and expenses of three state officers, no other persons in the state being required to contribute any portion of the same, and require them to pay a tax of a nature, character and amount not required of other corporations and persons within the jurisdiction of the state.

The attorney general of the state appeared for the treasurer of Richland county, and admitted that that officer, under the order and direction of the comptroller-general of the state, had collected of the plaintiff the sum claimed (\$987.75), as the just proportion of the entire expenses of the railroad commissioners of the state assessed upon that corporation by him, and also the sum of \$24.70, being the amount of costs and penalties charged against it by his direction, and that the same were paid under protest; denying, however, that the laws under which the amount was assessed against the plaintiff, and collected, were unconstitutional and void, or that the same was illegally and wrongfully collected.

The constitution of South Carolina declares that "all property subject to taxation shall be taxed in proportion to its value," and that its legislature "shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property," with certain specified exceptions not affecting the questions presented.

The case was heard by the court of common pleas for Richland county, and by its decree the validity of the assessment and tax was sustained, and the complaint dismissed. On appeal to the supreme court of the state the judgment was affirmed, and to review that judgment the case is brought here on writ of error.

*Linden Kent* for plaintiff in error.    *Wm. E. Earle* and *N. L. Jeffries* for defendant in error.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.

Notwithstanding the several objections taken in the complaint

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to the assessment and tax upon the railroad companies to meet the expenses and salaries of the railroad commissioners, the argument of counsel on the hearing was confined to the supposed conflict of the laws authorizing the tax with the inhibition of the fourteenth amendment of the constitution of the United States. All other objections were deemed to be disposed of by the decision of the supreme court of the state that the laws complained of are not in conflict with its constitution.

The property of railroad companies in South Carolina is subjected by the general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality in its assessment are imposed. The further tax laid upon them to meet the expenses and salaries of the railroad commissioners is not in proportion to the value of their property, but according to their gross income, proportioned to the number of miles of their roads in the state. This tax is stated to be beyond any which is levied upon other corporations to meet an expenditure for state officers, and, therefore, it is contended, constitutes an unlawful discrimination against railroad corporations, imposing an unequal burden upon them, in conflict with the constitutional amendment which ordains that no state shall deny to any person the equal protection of the laws. Private corporations are persons within the meaning of the amendment. It has been so held in several cases by this court. *Santa Clara Co. v. Railroad Co.*, 118 U. S. 394; 6 Sup. Ct. Rep'r, 1132; *Mining Co. v. Pennsylvania*, 125 U. S. 181, 189; 8 Sup. Ct. Rep'r, 737; *Railroad Co. v. Beckwith*, 129 U. S. 26; 9 Sup. Ct. Rep'r, 207.

If the tax were levied to pay for services in no way connected with the railroads, as for instance, to pay the salary of the executive or judicial officers of the state, while railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations, and of their not receiving the equal protection of the laws. But there is nothing of this nature in the tax in question. The railroad commissioners are charged with a variety of duties in connection with railroads, the performance of

which is of great importance in the regulation of those instruments of transportation. They are invested with the general supervision of all railroads in the state, and are obliged to examine the same, and keep themselves informed as to their condition, and the manner in which they are operated, with reference to the security and comfort of the public, and compliance with the provisions of their charters and the laws of the state. Whenever it appears to them that a railroad corporation has violated any law, or neglected in any respect or particular to comply with the terms of its charter, especially in regard to connections with other railroads, the rates of toll and the time schedules, they are obliged to give notice thereof to such corporation; and if the violation or neglect is continued after such notice, to apply to the courts for an injunction to restrain the company complained of from further continuing to violate the law or the terms of its charter; and whenever it appears that repairs are necessary to any such road, or that any addition to the rolling stock or any enlargement or improvement in the stations or station-houses, or any modification of the rates of fare for transporting freight or passengers, or any change in the mode of operating the road and conducting its business is reasonable and expedient, in order to promote the security, convenience and comfort of the public, they are required to give information to the corporation of the improvements and changes adjudged to be proper, and, if the company fail within sixty days to adopt the suggestions made to take such legal proceedings as may be deemed expedient to compel them. It is their duty to listen to complaints against a railroad company made by the authorities of any city, town or county, and to give its officers due opportunity of explanation, and, if the complaint is sustained, to require the corporation to remove the cause of complaint. They are required to investigate the cause of any accident on the railroad resulting in the loss of life, and of any accident not so resulting, which shall require investigation, and to make annual reports to the legislature of their official acts, including such statements and explanations as will disclose the actual working of the system of railroad transportation in its bearing upon the business and prosperity of the state, with such suggestions as to the general railroad policy of the state, or as to any part thereof, or as to the condition, affairs or conduct of any of the railroad corporations, as may seem to them appro-



priate, with a special report of all accidents, and the causes thereof, for the preceding year.

All contracts, agreements or arrangements of any and every nature, made by any railroad company doing business in the state, for the pooling of earnings of any kind with any other railroad company or companies, are to be submitted to the commissioners for their inspection and approval, so far as they may be affected by any of the provisions of the act for securing to all persons just, equal and reasonable facilities for transportation of freight and passengers; and if the contracts, agreements or arrangements shall, in the opinion of the commissioners, in any way be in violation of the provisions of the act, the commissioners are to notify the railroad companies, in writing, of their objections thereto, specifying them; and if the railroad companies, after such notice fail or neglect to amend and alter such contract, agreement or arrangement in a manner satisfactory to the commissioners, they shall call upon the attorney-general to institute such legal proceedings as may be necessary to enforce the penalties prescribed for such violations.

It is evident, from these and many other provisions that might be stated, that the duties of the railroad commissioners, when properly discharged, must be in the highest degree beneficial to the public, securing faithful service on the part of the railroad companies, and safety, convenience and comfort in the operation of their roads. That the state has the power to prescribe the regulations mentioned there can be no question. Though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise, and are invested, for that purpose, with special privileges. They are allowed to exercise the state's right of eminent domain, that they may appropriate for their uses the necessary property of others upon paying just compensation therefor, a right which can only be exercised for public purposes. And they assume, by the acceptance of their charters, the obligations to transport all persons and merchandise upon like conditions and at reasonable rates; and they are authorized to charge reasonable compensation for the services they thus perform. Being the recipients of special privileges

from the state, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a public use, and to the extent of that use is subject to legislative regulation. *Banking Co. v. Smith*, 128 U. S. 174-179; 9 Sup. Ct. Rep'r, 47. That regulation may extend to all measures deemed essential, not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discrimination. It may embrace a general supervision of the operation of their roads, which may be exercised by direct legislation commanding or forbidding under severe penalties, the doing or omission of particular acts, or it may be exercised through commissioners specially appointed for that purpose. The mode or manner of regulation is a matter of legislative discretion. When exercised through commissioners their services are for the benefit of the railroad corporations as well as of the public. Both are served by the required supervision over the roads and means of transportation; and there would seem to be no sound reason why the compensation of the commissioners in such case should not be met by the corporations, the operation of whose roads, and the exercise of whose franchises are supervised. In exacting this there is no encroachment upon the fourteenth amendment. Requiring that the burden of a service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws, nor making any unjust discrimination against them. All railroad corporations in the state are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and, therefore, no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered.

The legislative and constitutional provision of the state that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income, in proportion to the number of miles of railroad operated in the state, to meet the special service required. *Barbier v. Connolly*, 113 U. S. 27; 5 Sup. Ct. Rep'r, 357; *Soon Hing v. Crowley*, 113 U. S. 703; 5 Sup. Ct. Rep'r, 730; *Railway Co. v. Humes*, 115 U. S. 512; 6 Sup. Ct. Rep'r, 110.

There are many instances where parties are compelled to perform certain acts, and to bear certain expenses, when the public is interested in the acts which are performed as much as the parties themselves. Thus, in opening, widening or improving streets, the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease; yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan, etc., Co. v. Louisiana Board of Health*, 118 U. S. 455, 466; 6 Sup. Ct. Rep'r, 1114. So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Railway Co. v. Alabama*, 128 U. S. 96, 101; 9 Sup. Ct. Rep'r, 28. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself, instead of upon the whole state. Thus, in *County of Mobile v. Kimball*, 102 U. S. 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole state was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the state, or be apportioned between them, is matter of legislative direction.

We see no error in the ruling of the court below upon the fed-

eral question presented, and the conclusion we have reached renders it unnecessary to consider how far the obligation of the corporation was affected by the alleged amendment made to its charter.

Judgment affirmed.\*

Justices Bradley and Gray did not sit in this case, nor take part in its decision.

This case seems to be one of first impression, so far as the particular point decided is concerned. As to the burdens which may be cast upon corporations by virtue of the police power of the state, see *State v. Chicago, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 664; *Am. Rapid Tel. Co. v. Hess*, 4 Am. R. R. & Corp. Rep. 199, and note; *Chicago, etc., R. Co. v. Chicago*, 4 Am. R. R. & Corp. Rep. 697, and note; *Maine v. Grand Trunk Ry. Co.*, ante, p. 248.

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AMERICAN BANK-NOTE CO. V. NEW YORK EL. R. CO. ET AL.

(Court of Appeals of New York, Dec. 15, 1891.)

1. ELEVATED RAILROADS IN STREETS. PRESCRIPTIVE RIGHT TO OCCUPY STREET. Twenty years' adverse possession of part of the air, light and access appurtenant to a city lot by means of the maintenance of an elevated road in the street in front of such lot is sufficient to give title to such easements by prescription, even though the possession is based on no actual adverse title. *Briestedt v. Railroad Co.*, 55 N. Y. 220, distinguished.

2. The possession of a street by an elevated railroad company under a charter which provides that any private property used or acquired shall be compensated for by the company is not necessarily subordinate to the street rights of the owners of abutting property.

3. WHEN OCCUPATION BY RAILROAD NOT ADVERSE TO RIGHTS OF ABUTTING OWNERS. In an action against an elevated railroad company for injury to a lot abutting on the street on which the road runs, the company pleaded title by prescription. The evidence showed that the original entry upon the street was merely experimental; that during the twenty years' possession relied on to establish the title the road had been changed from a cable road to a steam railroad; that the original possession was taken when both parties were ignorant that the maintenance of the road interfered with the rights of the owners of abutting property; and that, after the expiration of said twenty years, the company instituted proceedings to condemn the lot-owner's street rights. Held, that the evidence justified a finding that the company's possession was not adverse to the lot-owner.

4. CHANGE OF CABLE TO ELEVATED ROAD. EFFECT UPON AMOUNT OF RECOVERY. Where some part of the street rights of a lot-owner have been taken by an elevated road operated by a cable, and afterward the cable company's

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\* Reported in 12 Sup. Ct. Rep'r, 255; 149 U. S. 386.

successor changes the road into one operated by steam, and increases the amount of interference with the lot-owner's street rights, the lot-owner's acquiescence in the operation of the cable road, even though it has continued for twenty years, does not diminish the damages which he may recover from the steam road for its interference with his street rights.

5. DAMAGES AS AN ALTERNATIVE TO INJUNCTIVE RELIEF. MEASURE OF. In an action by a lot-owner to restrain the operation of an elevated road where the court grants in the alternative either an injunction or the payment of damages by the company, such damages should not exceed the compensation to which the lot-owner would be entitled were the proceeding one for the condemnation of his street right.

6. NOISE AS AN ELEMENT OF PERMANENT DAMAGES. In such case, damages for injury resulting from the noise of passing trains should not be allowed, since such damages are only recoverable where the injury from noise was caused while the road was maintained without right. Rager, C. J., and Peckham and O'Brien, JJ., dissenting. *Kane v. Railroad Co.*, 26 N. E. Rep'r, 278; 125 N. Y. 164, distinguished.

**A** PPEAL from superior court of New York city, general term. Action by the American Bank-Note Company against the New York Elevated Railroad Company and others. Plaintiff obtained judgment, which was affirmed by the general term. Defendants appeal. Modified.

*Julien T. Davies* for appellants. *Peckham & Tyler* for respondent.

FINCH, J. This appeal is from a judgment awarding to the plaintiff compensation for the taking of its property by the construction and maintenance of the elevated railway in Greenwich street, and in front of plaintiff's premises abutting on that street; and also assessing damages for past injuries occasioned by the same operative cause; and two principal questions are presented for our consideration.

The defendants assert title by prescription to so much of the plaintiff's property in the street as was originally taken by the West Side and Yonkers Patent Railway Company, to whose rights and franchises the defendants have succeeded. If, upon the trial, a broader right by prescription was claimed, it had its sufficient answer in the remark of the court, appended to the fifth request of the defendants' proposed conclusions of law, that "the defendants have not maintained and operated a road in the present condition for twenty years. They cannot, by using a one-track

road for fifteen years and a four-track road for five years, obtain the right to run the four-track road by prescription." That is so obviously true as to make needless any further reference to the broader claim, but a narrower and more plausible one was asserted and founded upon a distinct finding of fact "that a part of the light, air and access of the premises Nos. 115 to 123 Greenwich street was taken for the use of defendants' railroad when it was first constructed and put in operation, July 2, 1868, and has been continuously used since for said railroad purposes." There is no finding of fact that this continuous possession of some undefined and undescribed part of plaintiff's property in the street was adverse. On the contrary, the court refused to make such finding, and further refused the defendants' proposed conclusion of law "that before this action was commenced the presumption of law "that before this action was commenced the presumption of a grant of the right to maintain and operate an elevated railroad on the east side of Greenwich street from the then owner of said property to the defendants' predecessor's company had become conclusive by lapse of time." Exceptions were taken to these refusals, and raise the question to be discussed, for, without criticising the manner of the requests or the form of the pleadings, we think it best to meet the claim in its full force, and dispose of it on the merits. It was quite material to the defense interposed, for, while the narrower and final claim does not justify the complete and entire infringement upon the rights of the abutting owner shown by the proof, since the present railway destroys these rights to a much greater extent and in a more injurious manner than resulted from the original structure, yet it is argued that the claim bears upon the question of permanent or fee damage, and that by rejecting the defendants' prescriptive right on the east side of the street, if in fact it existed, compensation has been awarded the plaintiff to some extent for property which in reality belonged to the defendants. The question, therefore, is whether they obtained title to any part of the plaintiff's incorporeal right in the street; and that again resolves itself into the inquiry whether the possession of the defendants and their predecessors was continuous, and was or was not adverse. Ordinarily, that is a question of fact. It may be conceded that, where the undisputed proof shows that the party asserting title entered upon the premises under a claim of right adverse to the true owner,

and retained an open, exclusive and hostile occupation for twenty years, to the knowledge and palpable injury of such owner, while not incapable of vindicating his right, and there are no other or contradictory facts, a presumption of title will arise, and the court should find in accordance therewith. But the presumption is not conclusive as against other and further facts. It serves only to shift the burden of showing the true character of the possession to the owner. *Hammond v. Zehner*, 21 N. Y. 118. And where there are other facts, tending to justify a different inference, and leading fairly to a contrary conclusion, they are also to be taken into the account, and the question becomes, if not wholly one of fact, at least a mixed question of law and fact, depending more or less upon the circumstances proved. Such I believe to be the situation in the case at bar; for, if not at the beginning of the railway occupation, at least along the line of its continuance, and at the end of the twenty years, there were facts and incidents which challenge the adverse character of the possession, and even its continuity as unbroken or unchanged.

The West Side and Yonkers Railway Company became a corporation under the general act of 1850. By force of its provisions the company had the right of eminent domain, and could condemn such property of individuals as it needed for its corporate purposes. But in 1867, by chapter 489 of the Laws of that year, it was given special and peculiar rights in the streets of the city. The act was entitled "An act to provide for the construction of an experimental line of railway in the counties of New York and Westchester," and authorized the primary erection of an elevated railroad beginning at the southerly extremity of Greenwich street, and extending northerly for half a mile. The supporting columns were to be placed along the curb-stone line, and to carry a track not more than five feet in width, the center of the track to be perpendicular to the center of the columns, and not less than fourteen feet above the surface of the pavement. The road was required to be "operated exclusively by means of propelling cables attached to stationary engines placed beneath or beyond the surface of any street through which said railway may pass, and shall be concealed from view so far as the same may be detrimental to the ordinary uses of said streets. The half mile of road was to be completed in one year, and its experimental character

was shown by the provision that, when ready for operation, it should be inspected by commissioners appointed for that purpose, upon whose report that it could be operated with safety and dispatch its extension northerly was to be permitted, but upon whose report to the contrary the structure was to be taken down, and the street restored to its original condition. Until the action of the commissioners, at least, the possession of the railway company was both temporary and experimental. The act, however, contained other provisions. By section 7 it was enacted that "any private property used or acquired shall be compensated for by said company under provisions of existing laws authorizing the formation of railroad companies and the acquisition of rights of way therefor." The provision seems to have contemplated some possible user of private property, for which compensation should be made. By section 11 it was provided: "The said company shall be liable for and shall pay all damages which may result to private property or the owners thereof by reason of the construction of said road;" and was required to give a bond in the penal sum of \$500,000 conditioned for the payment of all such damages.

The entry and possession of the West Side and Yonkers Company was under this charter. That was the grant and the specific title under which it occupied and used the streets as it did occupy and use them. The entry was not under a general claim of right adverse to all others, but under a specific and definite legislative grant, beyond and outside of which nothing was separately claimed. Neither the company nor individuals along the line knew that this title was imperfect, because there were incorporeal rights in the street belonging not to the public, but to the abutting owners; and yet the property in fact existed, and the company took it without right, but, it must be admitted, under color of title and claim of right, since the property taken was within the apparent and possible boundaries of the grant under which the entry was made, and for a time was supposed by both parties to be in fact within its actual and legal boundaries. We have described that entry as a trespass, as an invasion of the rights of the adjoining owners, and as an exclusive and injurious seizure of their incorporeal rights in the street. The possession which followed we have declared to be a continuous wrong, for which all



the time and every day damages accrued, and should be awarded. That such an entry may be adverse, and sufficient to initiate a possession which at the end of twenty years would ripen into a title, would seem to be quite clear were it not for the decision of the general term that the entry was in subordination to the rights of the abutters, and so not adverse to them. The authority relied on is the case of *Broiestedt v. Railroad Co.*, 55 N. Y. 220, which, I think, has no just application to the case in hand, as the learned counsel for appellants elaborately explains. The action was by the owner of the soil of a highway to restrain the maintenance and operation of a railroad in front of his premises. The answer was, among other things, that the plaintiff's deed was void, because the *locus in quo* was held adversely by the defendant at the time of the conveyance. The court ruled to the contrary, using this language: "The possession was not adverse, but was under license by act of the legislature, which only extended to the rights of the public. The entry under this license is presumed to have been in subordination to the rights of the owner." It must be observed of this decision that it related to the defense of champerty. A violation of the statute in that respect could only be shown by establishing a possession under some specific title which was itself adverse to the title of the plaintiff's grantee. *Crary v. Goodman*, 22 N. Y. 170. There must be a specific adverse title before there can be an adverse holding under the statute against champerty. *Sands v. Hughes*, 53 N. Y. 287. Bearing in mind this distinction, it is easy to see what was in truth decided in the *Broiestedt* Case. The specific title asserted was one which transferred the public right. That public right was consistent with the private right, and in no respect conflicted with it or assailed it. The legislative grant, therefore, neither conveyed nor purported to convey the fee in the soil, which was the title asserted, nor any right of the individual owner; and so it appeared that the defendant, required to show the specific title under which it claimed to hold, showed only one which was not adverse to that of the plaintiff, because it showed none at all to the right which was the basis of the plaintiff's claim. Having, therefore, no adverse title, the defendant's possession could not be an adverse holding under the statute, and, if not adverse, it must necessarily be presumed to have been in subordination to the plaintiff's title and right.

That was the scope of the decision, and its full and entire force.

But in the present case, and under the statute of limitations, an actual adverse title is not necessary to an adverse possession. The latter may be asserted and may exist without showing any specific title at all. A general assertion of ownership will suffice if there be color of title, however groundless in fact; and in such a case the possession may be adverse, and, therefore, not presumptively in subordination to the rights of the true owner. As against a defense that the plaintiff's deed was void because when taken the street right was adversely held, the Broiestedt Case is decisive; but as against the defense of title by prescription derived from a general adverse possession of the appurtenant rights under claim of right and color of title that case is not available.

Nor can I sustain the doctrine of the general term upon the ground that the charter under which the company entered recognized the abutter's street rights through the provisions for compensation. The terms of section 7 relate to the ordinary acquisition of private property by condemnation, and undoubtedly had in view lands out of the street necessary for power stations or other incidental conveniences; and the provision of section 11, requiring the payment of consequential damages to any private property injured, indicates a legislative understanding that the condition was necessary, because without it the injured parties would have no redress. So far from recognizing street rights in the abutters, it inferentially assumes, as was then supposed, that they had no existence. Indeed, mere provisions for compensation in a charter have never been regarded as making the entry upon private property necessarily subordinate to the private right, and very numerous cases could be cited in which the entry was deemed adverse, and such as could ripen into a prescriptive title, although made under an authority which provided for compensation. *Baldwin v. Calkins*, 10 Wend. 169; *Railroad Co. v. McFarlan*, 43 N. J. Law, 605; *Calway v. Railroad Co.*, 128 N. Y. 132; 28 N. E. Rep'r, 479. The theory of the general term, therefore, cannot be sustained, while nevertheless it may very well be that two circumstances connected with the original entry should be taken into account as bearing upon the character of the possession, although not at all conclusive. The entry was temporary and experimental, asserting

no permanent or absolute right; and neither party knew or supposed that any street rights of abutters existed. There was no conscious or intended adverse holding by the company, and no conscious or intended submission by the plaintiff. While that mutual ignorance may not legally change the situation, it is an element in the conduct of the parties, which may be taken into the account. But there are further facts. The act of 1867 was followed by the supplemental act of 1868 (chap. 855). That extended the time of construction for six months, authorized such form of application of the propelling cable or other motor as the commissioners should approve, dictated the payments to be made to the city, and permitted a change of the company's name. In June of that year a favorable certificate of the commissioners was made and filed, and the road was put in operation, propelled by a cable, July 2 following. In 1871 steam-dummies were substituted for the cable, and in 1879 the east track was taken down, and, as it is said, reconstructed. That process, however, involved a removal of the columns from the curb-line a distance therefrom, and within the sidewalk, of sixteen inches. I think these changes were material and substantial, and injuriously affected the adjoining owners, and that the right now claimed and exercised is not identical with the original user. Nor am I able to concede that, because some part of the plaintiff's right to light and air and access taken by the experimental road is also taken by its successors, a title is made to that undefined and non-separable part. The user cannot, in that manner, be divided and separated, and never was so divided and separated. The part continuously used was so used as an integral element of two different users, and, having no separate and severable existence or identity, must share the fate of such different users, and cannot stand upon its own, which never had a defined and independent existence. I think that truth must necessarily follow from two considerations. In all cases of rights by prescription the right acquired is measured by the extent of the use, and that in turn by the purpose of the user; and where essentially different purposes govern separate and successive users it is rarely, if ever, possible to deem the latter identical in any respect or degree. A right of way for one purpose gained by user cannot be turned into a right of way for another purpose if the latter adds materially to the burden of the servient estate; and the right

derived from user can never out-run or exceed the user in which it had its origin. It is also to be recalled that prescription presupposes a grant which conveys a definite right corresponding in all material respects with some equally definite user, which has a distinct and tangible purpose. Now, it is possible to presume a grant for a track above the curb-stone line, and for the purpose of a cable road, and also to presume another and different grant for a right above the sidewalk and the purpose of a steam railway; but how can we presume a grant of a fraction common to each, which never had a user of its own or a purpose of its own, and could not accomplish either one of the two existing purposes? We are referred to the case of *Baldwin v. Calkins*, 10 Wend. 169, as showing that a separable excess of user beyond that authorized may be cut off, and leave the true right uninjured and intact. But that true right preserved was a definite and distinct right, capable of a separate user, and having a real and conceivable purpose, but nothing of that sort can be said of the fraction here claimed.

The new use on the west side is essentially different from the earlier one, even as it respects the single track, and cannot be saved or modified by tacking to it the use for a cable road on the curb-stone line; for, if we suppose that in 1867 the plaintiff had granted to the defendants the right to construct and operate a cable road supported by columns in the curb-stone line, and thereafter the latter had built and operated on the east side the present road, and were sued for so doing, the previous grant would certainly be no defense to an injunction or damages. In *Davenport v. Lamson*, 21 Pick. 74, the facts were that the defendant had a right of way to carry hay from a three-acre lot across plaintiff's close, and, owning another lot of nine acres adjoining his three acres, threw down the fence between, and began to carry across the produce of the twelve acres, and was sued in trespass *quare clausum*. The court held the action maintainable, and that the case was not one for the apportionment of damages. The doctrine involved was very evidently that the trespass was such as a whole, though some inseparable lesser right might be mixed in with it. And in another case it was ruled that, where a town had enjoyed a drain to discharge water on another's land for a period less than twenty years, and then deepened it, and enlarged it, and varied its course, but continued to use it, such change

interrupted the use and prevented an acquisition of the easement, short of twenty years' enjoyment of it as it then was. *Cotton v. Manufacturing Co.*, 13 Metc. (Mass.) 429. These illustrations show what changes are sufficient to interrupt the use and turn a right into a wrong, and that the latter is not affected or modified, even as to damages, because there is in it some inseparable or indivisible element of right. Such a mingling is wholly the act and the fault of the trespasser. His conduct is such as to make impossible any apportionment; and so, where he claims title by user, he cannot, upon the same principle, lessen that title to the indivisible and inseparable fragment, in order to add together two radically different users that they may extend over twenty years. Indeed, that fragment itself was used differently by the successive companies, and so as to make utterly unjust any attempt to utilize the earlier silence and submission of the adjoining owner. While that fraction was used as incidental to a cable road on the curb-stone line, the plaintiff might have submitted to it because the inconvenience was no greater; but to add that submission to another and radically different use, which is resisted before it ripens into a title, in order to gain ownership of the fragment, is obviously unfair and unjust. It may be said generally that one cannot prescribe for an indivisible fraction of two essentially different users, having essentially different purposes, because such fraction happens to be common to both. If the fraction is itself a complete and independent user, representing a complete and entire right, it may stand, with the fractional and separable excess rejected. But if it be itself a mere fraction of two different users, which never could be used by itself for either of the two purposes, and never existed as an independent and practicable right, and is dependent in each case upon the users to which it belongs, it cannot be separately prescribed for. The views thus expressed on this branch of the case appear to be equally supported by the authorities if the construction and operation of the elevated road is treated as a nuisance, as we have sometimes declared it to be. The rule is stated in *Wood on Nuisances*, page 727, section 710, that a prescription is entire, and cannot be split by either the party setting it up or the party opposing it. And where the action was for polluting the air, and the defense a prescriptive right, the defendant was required to

show that he had a right to do all that the declaration charged. He could not defend by setting up a prescriptive right to do less, and, if he failed to show one to the extent of the user with which he is charged, his action was undefended. *Rotheram v. Green, Noy*, 67; *Tappling v. Jones*, 11 H. L. Cas. 290; *Weld v. Hornby*, 7 East, 195; *Bailey v. Appleyard*, 3 Nev. & P. 257.

But there is still another fact to be considered. After the expiration of twenty years from July 2, 1863, and during the pendency of the present action, the defendants instituted proceedings to condemn the plaintiff's street rights. There is no question over the admissibility of the evidence, for the defendants themselves gave the proof. This proceeding was necessarily a solemn and formal admission of record of title in the plaintiff to the incorporeal rights in question. It is to be granted that such an admission, made after the prescriptive right had been acquired, would not serve to destroy it. But the admission is evidence reflecting back upon what has occurred, and tending to show what the real character of the possession claimed to be adverse in truth was. *Perrin v. Garfield*, 37 Vt. 304. The company knew what its own possession and that of its predecessors had actually been, and it is hardly conceivable that, if such possession had been adverse either in fact or in intention, an admission would be formally made of ownership in the easements outstanding in the abutter. We are thus enabled to see all the facts aggregated upon which the trial court acted in determining that there was no adverse possession. It was shown that the original entry was temporary and experimental, and, even after the certificate of the commissioners, remained such in fact while operated as a cable road, and ended in practical failure; that the original possession was in ignorance of the right at a later period claimed on one side and denied on the other; that the only possession for twenty years was of an unseparated and inseparable fragment of the two essentially different users; and that, after the twenty years, the defendants instituted proceedings for the condemnation of the plaintiff's street rights. Upon these facts it is quite apparent that the conclusion of the trial court denying an adverse possession was not only warranted by the evidence, but entirely justified by it.

Passing over some other questions raised by the appellants,

which we have examined, but do not think it necessary to discuss, we come to a final question relating to the measure of damages. In awarding an injunction restraining the continuance of the elevated road in front of plaintiff's premises the court fixed as an alternative the payment by the defendants of \$50,000 for the permanent or fee damage, and specifically awarded \$1,000 of that amount as damages resulting from the noise of passing trains. We have already decided that in an action at law for the wrong done to abutters, and in which past damages only are sought, the elevated roads are liable for the noise of their trains, upon the ground that they are trespassers, and responsible for all injuries resulting from their wrongful act. *Kane v. Railroad Co.*, 125 N. Y. 164; 26 N. E. Rep'r, 278. Probably the old technical action of trespass was inappropriate, as was the action of ejectment to the redress of an injury to an incorporeal right; but the wrong done could have been reached by an action on the case, and may properly be called a trespass upon the property of the abutting owners, and the trespassers are liable for all the damages resulting from the wrong. But the question is quite different when no trespass and no wrong is in any manner involved, and the sole inquiry respects the compensation to be awarded to an owner whose property is to be rightfully taken under the due authority of law. There is no doubt in this case, and I think no doubt in any case, that the injunction of a court of equity and its alternative damages are to be deemed a substitute for the ordinary proceeding for condemnation, with the practical difference only that in the one case the company is the moving party and in the other the owner; for this court does not in the least degree assent to the doctrine which has sometimes been advocated, that the alternative damages are wholly in the unlimited discretion of the court, and so the elevated roads entirely at their mercy. We had supposed that every trace of a boundless and arbitrary discretion in a court of equity had wholly disappeared. There is no difficulty in assuming that the alternative damages are awarded to the same extent and for the same elements as the compensation given in a special proceeding for the condemnation of land under the law of eminent domain. Such a process in each case ends in the same substantial redress. The form is different, but the result is identical. It follows, therefore, that the alternative damages of equity

must be such, and only such, as would be given in a proceeding for the condemnation of lands for a railroad use, due regard being had to the different characteristics of the property to be taken. We must, as a consequence, recur to the legal rules which have been established in such cases. They have their foundation in the constitutional provision that private property shall not be taken for public use without just compensation, and in the terms of the general railroad act formulating the mode of procedure. Those provisions are made applicable to the present controversy both by the original West Side and Yonkers charter and by a substantial repetition in the rapid transit act of 1875, so that the rules governing the acquisition of private property by the elevated roads are identical with those controlling the similar acquisition by surface railroads, modified only by the character of the property acquired. What the elevated roads take from the abutter are his easements of light, air and access. The extent of that taking involved some things which, in the case of a surface road, would be merely incidental or consequential injuries, for which the abutter could not recover, since it is well settled, both in this state and under even the broad English statute of 8 & 9 Victoria, that where a public use authorized by law takes no land of an individual, but merely affects him by its proximity, the necessary annoyances of that perfectly lawful use furnish no basis for damages. Now, the elevated roads take no land from the abutter. They stand wholly upon the land owned by the municipality, and no consequential damages flowing from the lawful corporate user could be recovered but for the fact that some of them, though not all of them, have been by the Story Case, 90 N. Y. 122, transformed from consequential injuries into invasions of property rights. To the extent of that transformation the rule of damages must feel the effects of the change, but beyond that the further consequential injuries have not lost or changed their character, and to allow them as elements of compensation is to transform them also into invasions of property, and add a new brood of easements to those already awarded to the abutter, instead of leaving them where the Story Case left them, the mere incidents of a lawful use. In the Drucker Case (N. Y. App.), 12 N. E. Rep'r, 568, the full extent of the transformation bringing with it the liability for damages was sketched in these words: "Smoke



and gases, ashes and cinders, affect and impair the easement of air; the structure itself and the passage of cars lessen the easement of light; the drippings of oil and water, and possibly the frequent columns, interfere with convenience of access;" but there is no hint of any allowable recovery beyond what *pro tanto* constituted some element of the taking. In the Lahr Case (N. Y. App.), 10 N. E. Rep'r, 528, Ruger, C. J., was equally guarded, saying that the incidental injuries could be recovered, "provided the evidence established the fact that they were destructive of the easements of light, air and access;" and these careful expressions were used, although neither case involved a question of fee damage. I am adverse to adding to the abutter's easements by changing their name and doing indirectly what I am sure none of us would do directly. Even the ground upon which that effort is necessarily rested partakes of the uncertain qualities of a quicksand. It is said first that the taking of easements should be deemed the equivalent of the taking of land. That was held in the Duke of Buccleuch's Case, L. R., 5 H. L. 418, where the easement affected was a right of way, and so quite different from the *quasi* easements of abutters, as well as unaffected by the peculiar considerations which surround the new and unusual use. It is then said that, under the law affecting surface railroads, where the land of the owner is taken, he is entitled to the diminution in the value of the part not taken occasioned by the use to which the part taken is to be put.

The analogy relied on is, I think, not at all perfect, and the rule invoked is by no means settled, but, on the contrary, most strongly held the other way. The current of authority in the supreme court, which has been the final arbiter in this class of proceedings, is rather against, than for the doctrine asserted. In Railroad Co. v. Lee, 13 Barb. 169, and more explicitly in Railroad Co. v. Lansing, 16 Barb. 69, it was said that the award should only be for the taking of the land, and not for the use made of it, by the railroad; and it was argued with great justice that, since the statute excluded a consideration of the benefits resulting to the land from the railroad, it was unfair to compensate the owner for the disadvantages of the new use, and leave him to appropriate the advantages. The doctrine was followed in Railroad Co. v. Payne, 16 Barb 273; In re Union Village, etc., R. Co., 53 Barb. 457;

Railroad Co. v. Barnard, 9 Hun, 104; Railroad Co. v. Dayton, 10 Abb. Pr. (N. S.) 183; In re Boston Road, 27 Hun, 409; and the earlier cases were cited without a hint of disapproval in *Henderson v. Railroad Co.*, 78 N. Y. 433. But there came a change in *Re Utica, etc., R. Co.*, 56 Barb. 456. That case justified damages resulting from the use, founding its reasoning upon the language of the statute — a view which the last edition of Sedgwick on Damages controverts as based upon a misconception. That case and its changed rule was followed in two others — *In re New York C. & H. R. R. Co.*, 15 Hun, 63; *In re Lackawanna & W. R. Co.*, 29 Hun, 1; but it was deliberately overruled in *Re Elevated R. Co.*, 36 Hun, 427, which was a condemnation proceeding to take Story's easements, the existence of which he had vindicated. On such a state of the authorities it is not possible to say that there is any such settled rule as that contended for, and, if there should be in the future, I think it ought at least to be somewhat limited. But, whatever may be the ultimate rule in surface railroad cases, I think that, as to the elevated roads, the noise of their operation should not be taken into account as an element of fee damage. It follows that the judgment should be modified by striking out the sum of \$1,000 allowed for noise, and, as modified, affirmed, without costs in this court to either party as against the other.\*

Andrews, Earl and Gray, JJ., concur. Ruger, C. J., and Peckham and O'Brien, JJ., concur to affirm, but dissent to the modification

1. **Elevated railroads in streets — noise and vibration as elements of damage.**—The foregoing case may be regarded as presenting the definitive views of the court of appeals upon the subject of noise and vibration as elements of damage in the elevated railroad cases. That position is that where the action is by the abutting owner for the *wrongful interference* with his easements in the street, then the annoyance from noise and vibration may be considered in estimating the damages, but when the inquiry is as to the just compensation to which such owner is entitled for the *taking* of his easements to the extent they are interfered with, then the elements of noise and vibration are not to be considered. The principal case has been followed in the following more recent decisions: *Messenger v. Manhattan Ry. Co.*, 129 N. Y. 648; 29 N. E. Rep'r, 955; *Moore v. New York El. R. Co.*, 130 N. Y. 523; 29 N. E. Rep'r, 997. This position would seem to be correct, if it be conceded, as held by the same court, that a steam railroad upon the surface of the street, is a legitimate use of the same as a public highway. *Fobes v. Rome, etc., R. Co.*, 3 Am. R. R. & Corp.

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\* Reported in 29 N. E. Rep'r, 302; 129 N. Y. 262.

Rep. 182; S. C., 121 N. Y. 505. It follows from this last proposition that an abutting owner has no more ground for complaint on account of the noise and vibration produced by the operation of a surface railroad, than he has for the noise and vibration caused by heavy teaming upon the street. And if there is no remedy for the noise and vibration produced by a surface road, there would seem to be no reason why the noise and vibration produced by an elevated road should be considered as an element of permanent damages.

According to the views of the writer a steam railroad is not a legitimate use of a street as a public highway, and consequently the abutting owner may recover damages for such use of the street, whether he owns the fee or not. See note to *McQuade v. Portland, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 47; note to *Fobes v. Rome, etc., R. Co.*, 3 Am. R. R. & Corp. Rep. 191. The writer's views upon the subject of noise and vibration as elements of damages in such cases will be found in note to *Gainesville, etc., R. Co. v. Hall*, 3 Am. R. R. & Corp. Rep. 257. That the noise and vibration produced by the operation of a railroad upon adjacent property, if not authorized by the legislature, might be such as to be a nuisance at common law, is manifest. *Id.* See, also, *Wood Nuis.*, §§ 611-644; *Appeal of Ladies' Decorative Art Club (Penn.)*, 13 Atl. Rep'r, 537; *Hurlburt v. McKone*, 55 Conn. 31; *Wiley v. Elwood*, 134 Ill. 281; 25 N. E. Rep'r, 570. An abutting owner has a right that the street in front of his property shall not be used by a railroad in such a way as to create noise and vibration amounting to a nuisance. In a proceeding to estimate the just compensation to be paid the abutting owner for the permanent interference with his rights and easements in the street, this right to be exempt from the nuisance of noise and vibration, should be considered and damages should be allowed for any probable interference therewith. *Gainesville, etc., R. Co. v. Hall*, 3 Am. R. R. & Corp. Rep. 251, and note; *Chicago, etc., R. Co. v. Nix* (Ill.), 27 N. E. Rep'r, 81.

Many cases, however, favor a contrary view, among which may be cited the following: *Carroll v. Wisconsin Central R. Co.*, 40 Minn. 168; *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; *Worges v. Railroad Co.*, 35 La. Ann. 641; *Hill v. Railroad Co.*, 38 La. Ann. 599; *Railroad Co. v. Barton*, 43 La. Ann. 171. In *Carroll v. Wisconsin Central R. Co.*, the court says: "Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more, to other persons less. The operating them in the most skillful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another. For instance, one whose premises lie within a hundred feet of a railroad will feel the inconveniences in a greater degree than one whose premises are at the distance of a thousand feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible."

2. **Loss of privacy as an element of damages.**—In accordance with the rule announced in the principal case as to noise and vibration, it is held that interference with the privacy of premises may be considered in an action for the wrongful occupation of the street but not in estimating the permanent or fee damages. *Messenger v. Manhattan Ry. Co.*, 129 N. Y. 648; 29 N. E. Rep'r, 955; *Moore v. New York El. R. Co.*, 130 N. Y. 523; 29 N. E. Rep'r, 997. In the former of these cases which was in the nature of trespass or case for the wrongful use of the street, the court says: "The continued invasion of the privacy of the occupant of a building very likely would have the effect to reduce the rental value of it for some purposes. The first floor of the plaintiffs building was occupied as a grocery or liquor store, and the two above were occupied by persons as places of abode. But, so far as appears, only two rooms are exposed or subject to the loss of privacy. Those rooms are on the third floor, and have one window in front on Greenwich street and two on the Franklin street side. The opportunity by means of the windows, to look into the rooms, is from the station platform on both streets. The evidence on the subject was mainly given by a person who had occupied those rooms, and was to the effect that the looking in the windows by the passengers and employes was very annoying; that they did it from the station platform; and that they interfered with the privacy of the rooms, by looking in when standing on the platform and when coming down the stairs along the building. It may be seen that this exposure of the rooms, and the occupants within them, to the observation of persons at all times of the day, would be detrimental to them as dwelling-places. While it is true that the observation taken by the patrons and employes of the defendants is not the act of the latter, the defendants have furnished the means and opportunity for those persons to invade the privacy of these rooms by looking into them through the windows, and it is by the invitation and procurement of the defendants, for the purpose of the business of the road, that people are at the station and on its platform. No reason appears why the defendants should not be responsible for the consequences of the loss of privacy thus occasioned so far as it depreciated the rental value of the rooms in the plaintiffs building. Those consequences detrimental to the rooms are the rational result of the maintenance of the road and the station, and are reasonably attributable to that cause.

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## WILLIS V. ST. PAUL SANITATION CO. ET AL.

(Supreme Court of Minnesota, Jan. 13, 1902.)

1. **CORPORATIONS. STOCKHOLDERS. DOUBLE LIABILITY CLAUSE OF MINNESOTA CONSTITUTION CONSTRUED.** Article 10, section 3, of the constitution of Minnesota, providing that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him," is self-executing, and creates an individual liability on the part of the

stockholder for corporate debts to an amount equal to the amount of stock held or owned by him in addition to his liability upon his contract of subscription.

2. RELEASE OF CORPORATION UNDER INSOLVENT LAW. EFFECT UPON STOCKHOLDER'S LIABILITY. The provisions in section 1 of chapter 30, Laws 1899, amending the insolvent law of 1881, "that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt," includes stockholders who are liable for the debts of the corporation.

3. This provision is not unconstitutional, as applied to cases where the liability of the stockholder was incurred before, but the proceedings under the insolvent act were had and the corporation discharged subsequent to its passage.

**A** PPEAL from district court, Ramsey county, Brill, judge. Action by Elizabeth L. Willis against the St. Paul Sanitation Company and others to enforce, as against its stockholders, a sum due from said company. Judgment for plaintiff. Defendant E. L. Mabon appeals. Affirmed

*James H. Foote* for appellant. *J. C. & W. H. Michael* for respondent.

**MITCHELL, J.** 1. This was an action brought by a creditor of an insolvent corporation to recover from certain of its stockholders on their individual liability for the corporate debts, under what is commonly called "the double liability clause" of the constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." Art. 10, § 3. The principal question in the case is whether this provision of the constitution is self-executing, or whether it requires legislation to carry it into effect. The same question is also involved in the cases of *McKusick v. Seymour* and *Meagher*, 50 N. W. Rep'r, 1114 (submitted at a later day of the present term), and has been exhaustively argued in both cases. Some points were made by counsel in one case that were not urged in the other; but as the question is common to both cases, and as there was an understanding among counsel that all arguments presented in either should be considered in both, we shall endeavor to fully determine the question in the present opinion. In addition to

this main question, counsel for appellants in the *Meagher Case*, *supra*, urged that this constitutional provision is not intended to impose any "double liability" upon stockholders, but simply means that they shall be bound to pay for their stock once its "face amount," any device or agreement to the contrary notwithstanding, and that, having once paid for their stock in full, they are not further liable. Except for the eminence of the counsel who have advanced this view, we would not deem it entitled to serious consideration. While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into constitutions and statutes, and have been uniformly understood and construed as providing for an individual liability of stockholders for corporate debts in addition to this risk of losing the amount of their stock. This is the meaning which has been invariably attached to this provision of our constitution. It is the one attributed to it by this court in numerous cases, although never in the form of a direct and authoritative decision; and we do not believe that the construction now sought to be placed upon it ever occurred to, or was ever advanced by, any one, until suggested by counsel in the present case. Any such construction would render the provision meaningless and useless, for all that would be accomplished by it was already fully covered by the law. If a person had subscribed for stock, and had not paid for it the amount agreed, of course he was liable to the corporation, and through it, to its creditors; and if the stock had been issued to him as paid-up stock, when not in fact paid for, under such circumstances as to operate as a fraud upon creditors, he was, upon well-settled principles, liable to them as for unpaid stock subscriptions. The construction contended for would give the public no security beyond what they already had under the existing law. Its absurdity is rendered apparent when considered in connection with the amendment of November 5, 1872, inclosed in parentheses; for then the whole section would mean that, while the stockholders in all other corporations should be liable to pay once for their stock at its face amount, yet stockholders in manufacturing corporations need not be required to do so. The obvious intention of the provision was to add to the ordinary liability of a corporation for its debts the individual liability of the stockholders to a limited amount, and

that the measure of that liability should be a sum equal to the amount of stock owned or held by them. This stock is not the subject of the liability, but the measure of it; in other words, the stockholders are liable, not for the stock, but, in addition thereto, for a sum measured by the amount of the stock.

2. This brings us to the main question, viz., whether this provision of the constitution is self-executing. That such has been the general understanding of the bench, bar and business men in this state is conceded. This court has, in a long line of cases, assumed that such was the fact. *Dodge v. Roofing Co.*, 16 Minn. 373 (Gil. 327); *Allen v. Walsh*, 25 Minn. 543; *State v. Thresher Manuf'g Co.*, 40 Minn. 213; 41 N. W. Rep'r, 1020; *Mohr v. Elevator Co.*, 40 Minn. 343; 41 N. W. Rep'r, 1074; *Arthur v. Willis*, 44 Minn. 409; 46 N. W. Rep'r, 851; *Densmore v. Stone Co. (Minn.)*, 48 N. W. Rep'r, 528. And, so far as we are aware, the correctness of this view has never been questioned or doubted in any court, until one of the counsel in this case interposed a brief in *Arthur v. Willis*, supra, in which he took the position for which he now contends. Of course it is true, as counsel suggests, that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly-discovered one, suggested at this late day by the emergencies of present litigation. The fact that no such view ever before suggested itself to the minds of court or counsel in the numerous cases where the point might have been made, and where it was to the interest of counsel on one side or the other to make it, certainly raises a strong presumption against it. Moreover, as the generally accepted view has doubtless long been the basis of the credit of corporations, it ought not now to be disturbed, unless clearly wrong. But if the question was entirely one of first impression, we have no doubt as to how it should be determined. A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the

power of the legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing to the extent that any thing done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern constitution. For instances of this see *State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189; *Reynolds v. Taylor*, 43 Ala. 420; *Miller v. Marx*, 55 Ala. 322; *People v. Hoge*, 55 Cal. 612.

Without stopping to specify, it will be found on examination that our own constitution abounds in provisions that are unquestionably self-executing, and require no legislation to put them into operation. The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature — does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts. In almost every case cited by appellants in which a constitutional provision has been held not self-executing, it will be found either that its language indicated an intention that legislation should be had to carry it into effect, or that the nature of the provision itself was such as to render such legislation necessary. To the first class may be referred the provision in the constitution of Missouri (quite different from that in ours) considered in the case of *Morley v. Thayer*, 3 Fed. Rep'r, 739, although that case really only decided that the plaintiff could not recover because he had not followed the remedy provided by statute. To the same class belongs the case of *Jerman v. Benton*, 79 Mo. 148, although it seems to have been assumed, without argument or consideration, that the constitutional provision there considered required legislation to carry it into effect. To the second class belongs *Bowie v. Lott*, 24 La. Ann. 214, in which it was held that a con-



stitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres," required legislation to carry it into effect. This is plain from the very nature of the provision. It furnishes no *modus operandi*, and does not provide how or by whom the land was to be divided, nor determine the exact size of the tracts. It was evidently a mere general direction to the legislature. To the same class may be referred the case of *Missouri, K. & T. Ry. Co. v. Texas & St. L. Ry. Co.*, 10 Fed. Rep'r, 503, involving a provision in the constitution of Texas that "every railroad company shall have the right with its road to intersect, connect with or cross any other railroad," although all that was decided in that case was that the defendant railway company could not, on its own motion, make the crossing without the consent of the defendant, or without resort to legal proceedings in which the conditions and limitations under which such right should be exercised should be judicially fixed and determined. *Groves v. Slaughter*, 15 Pet. 499, cited by appellant, perhaps goes further than any other case in holding a constitutional provision not self-executing; but its weight as an authority is much weakened from the facts that it was not considered by a full bench, and was decided by a divided court, Justice Story being one of the dissenters. Moreover, it seems difficult to reconcile the decision in that case with the rule that prohibitory constitutional provisions are self-executing to the extent that any thing done in violation of them is void; or the further rule, which that court has always professed to follow, that it would adopt the construction given to the constitution and laws of a state, not conflicting with those of the Union, by the highest court of that state.

Of all the cases cited by appellant, the one most relied on is that of *French v. Teschemaker*, 24 Cal. 518. The constitution of California provided: "§ 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." "§ 36. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities." The court held that section 36 was not self-executing. But the decision was mainly based upon two considerations. The first was that, while this section provided that each stock-

holder should be liable for his proportion of the corporate debts, yet it did not determine what that proportion should be, nor prescribe any rule by which it should be ascertained. The second was that section 36 was to be read in connection with section 32, which was evidently addressed to the legislature. No such considerations exist here, and hence we do not think that the case is in point. The language used in our constitution is positive and mandatory. There is nothing in it indicative of an intention that ancillary legislation should be had to carry it into effect; neither is there any thing in the nature of the liability imposed such as to render any such legislation necessary. It is in the form of a present, complete enactment, which, although elliptical in form, definitely fixes the nature and amount of the liability, and to whom the liability is incurred. As remarked in *Allen v. Walsh*, supra, "it declares the creation of a liability to the extent named in the cases referred to." It is true that a question might arise as to whether it is the person who holds the stock when a debt is contracted, or the one who holds it when the action is brought, or any one who held it at any time while the debt existed, that is liable. But this is a mere question of construction, which would exist if the same or similar language were used in a statute, as, has sometimes been the case. But questions of construction, whether of a constitution or a statute, are for the courts, and not for the legislature. In fact, all the criticisms of the appellant upon this article of the constitution refer merely to supposed obscurities in its meaning, or doubts as to its construction; and the logic of their argument is that it is for the legislature to construe it, and determine its true meaning. According to their view, it means any thing or nothing, according as the legislature see fit to construe it. But the people meant something by this provision, and when that meaning is judicially determined by legitimate rules of construction, it is as obligatory on the legislature as on any one else.

Much stress is laid upon the fact that this provision contains no remedy for enforcing the liability, as indicating that it was not intended to be self-executing. We fail to perceive any force whatever in this line of argument. The maxim, *ubi jus ibi remedium*, is as old as the law itself. As was said by Lord Holt: "If a man has a right, he must have a means to vindicate and

maintain it, and a remedy, if he is injured in the exercise and enjoyment of it: and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." The maxim referred to gave occasion for the invention of that form of action called "an action on the case." The principle adopted by the courts accordingly was that the novelty of the particular complaint in an action on the case was no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Every statute made against an injury, mischief or grievance impliedly gives a remedy for, if no remedy be expressly given, a party has his action upon the statute. For example, "if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt for the penalty will lie." 2 Dwar. St. 677. So where a statute requires an act to be done for the benefit of another, or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured shall have an action; for where a statute gives a right, there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident. *Ashby v. White*, 2 Ld. Raym. 938. Hence in the present case it was not necessary that the constitution should have expressly given a remedy by which a creditor of the corporation might enforce the liability of a stockholder. If it in fact created such a liability of the latter in favor of the former, there would not be the least trouble in framing a proper complaint in an action to enforce it. Of course the remedy is always within the control of the legislature, and may be changed as they see fit, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy, and make it exclusive, if they see fit. An inference in favor of appellant's contention is sought to be drawn from the history of this provision in the constitutional convention. In the form in which it is now found, this provision was the one adopted by the Democratic wing of the convention. The provision first adopted was that "provision shall be made making each stockholder individually liable to the amount of stock held or owned by him." Counsel say, and doubtless correctly, that this would not have been self-executing, as its language was directed

to the legislature, and evidently contemplated legislation to carry it into effect. In this form it was adopted by the committee of the whole, and then referred to the committee on phraseology and revision, who reported it back in its present form ("every stockholder shall be liable," etc.), when it was adopted by the convention. To our minds, the material change which that committee made in the language indicates very strongly that the purpose of the change was to put the provision in the form of a self-executing enactment, and thus place it beyond the power of the legislature to defeat the object sought to be accomplished.

An argument is also sought to be drawn from subsequent legislative construction. We attach little or no importance to this. An argument either way might be made, for the legislation upon the subject of the individual liability of stockholders has been variable and not uniformly consistent either with the theory that the constitution itself created such a liability or that it did not. Upon the theory that it did, it must be confessed that some of this legislation was superfluous, and its repeal unavailing. On the other hand, it may be said that, in passing chapter 56, Laws 1878, making stockholders in manufacturing or mechanical corporations liable for corporate debts to the amount of stock held or owned by them, the legislature must have assumed that the constitution itself created such a liability in the case of other corporations, for it is not to be supposed that they would have singled out manufacturing corporations as the only ones where such a liability should exist. Moreover, the legislature in submitting, and the people in adopting, the amendment of 1872, excepting corporations organized for a manufacturing or mechanical business from the operation of section 3, article 10, of the constitution, must have supposed that this section *ex propria vigore* created an individual liability on the part of stockholders, for otherwise the amendment was useless and unnecessary, unless it was to relieve the legislature from a sort of moral obligation to legislate on the subject.

3. The answer in this case alleges that in July, 1889, the defendant corporation was, upon petition of creditors under the insolvent law of 1881, adjudged insolvent, and a receiver of its property appointed by the court, who had fully administered the corporate assets, and distributed the proceeds among those creditors who executed releases to the corporation as required by stat-

ute ; that plaintiff, in January, 1890, executed and filed such a release, and accepted her dividend from the receiver. It is claimed, under the doctrine of *Mohr v. Elevator Co.*, 40 Minn. 343 ; 41 N. W. Rep'r, 1074, that this release of the corporation had the effect of also releasing the stockholders. The plaintiff, on the other hand, claims that the rule of that case was changed by chapter 30, Laws 1889, entitled "An act to amend an act entitled 'An act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors,'" section 1 of the amendatory act providing "that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor or otherwise for the same debt." The point is made that this amendatory act is invalid, because the subject is not sufficiently expressed in its title. There is nothing in this. It recites *verbatim* the title of the original act, which sufficiently expresses the subject of that act. It is true that the title of the amendatory act does not refer to the chapter or year when the original act was passed, but this is unimportant, especially as there was no other act of the same title. Similar titles have been invariably sustained in this and other jurisdictions having the same constitutional provision. The title of this act is not materially different from that sustained by this court in *City of Winona v. School Dist.*, 40 Minn. 13 ; 41 N. W. Rep'r, 539.

It is further claimed that the amendment is inapplicable, because its terms will not include the liability of stockholders for corporate debts, the argument being that, where words of specific import are followed by a general term, the general term is to be taken to apply only to persons or things *ejusdem generis* with the specific terms ; that the words "or otherwise" must, therefore, be limited to those whose liability for the debt is of the same kind as that of surety or guarantor ; and that the liability of a stockholder for the debts of a corporation is different from that of either a surety or guarantor, and, therefore, not within the terms of the act. The act of 1889 was passed about two weeks after the decision of the *Mohr Case*, and the proviso referred to was doubtless enacted for the very purpose of changing the rule laid down in that case. That it had that effect was assumed in *Tripp v. Bank*, 41 Minn. 400 ; 43 N. W. Rep'r, 60 (decided August 12, 1889). Even under

the strict doctrine of *ejusdem generis*, we have no doubt that the term "or otherwise" would embrace those liable as stockholders for corporate debts; for, while that liability is *sui generis*, yet it is in many respects sufficiently analogous to that of surety or guarantor to fall within the same general class. But the doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the meaning of the legislature, and does not warrant a court in confining the operation of a statute within narrower limits than intended by the law-makers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors. Thus the expression "any bond or other specialty," has been held to comprehend every kind of specialty, including a statute. The evident intention was that this amendment should embrace all cases where some one else was liable, in whatever capacity, for the same debt with the insolvent debtor.

The insolvency proceedings against the corporation were instituted and its discharge granted after the passage of the act of 1889, but the debt for which plaintiff sues was contracted prior to that date; and it is claimed that the act is, as to stockholders whose liability had been already incurred, unconstitutional, because impairing the obligation of contracts. We confess our inability to appreciate the force of this argument. The liability of a stockholder is fixed and measured by the constitution alone. The insolvent law neither increases nor affects that liability, but has reference solely to the remedy of the creditor against the insolvent debtor. An existing creditor would have as much right to object to the passage of a bankrupt act, or a debtor to its subsequent repeal, as would this appellant to object to the amendment of this insolvent law. Bankrupt laws, either by express provision or by construction, generally provide that the discharge of the bankrupt shall not release another person who is liable for the same debt. This has been held indiscriminately in cases where the debt was contracted before, as well as where it was contracted after the passage of the bankrupt act, and it was never suggested that as to such other person the act was invalid, as impairing the obligation of his contract. The discharge of the insolvent or bankrupt in such cases, as we have repeatedly held, is not the voluntary act of

the creditor, but purely by operation of law, which, like the act of God, hurts nobody. Order affirmed.\*

**Corporations — double liability provisions of constitution.**— See 1 Beach Priv. Corp., § 145.

**BUDD V. NEW YORK; NEW YORK, EX REL. ANNAN, V. WALSH;  
NEW YORK, EX REL. PINTO, V. SAME.**

(Supreme Court of the United States, Feb. 29, 1892.)

1. **CONSTITUTIONAL LAW. REGULATING CHARGES OF GRAIN ELEVATORS.** The business of receiving grain in elevators for storage or transfer, as at present conducted, is one affected with a public interest, and the question of what is a reasonable compensation for the service rendered by such elevators is a legislative and not a judicial one. *Munn v. Illinois*, 94 U. S. 118, approved and followed.

2. **STATUTE OF NEW YORK FIXING A MAXIMUM RATE FOR ELEVATOR SERVICE HELD VALID.** The Laws of New York of 1888, chapter 581, fixing a maximum charge of five-eighths of a cent per bushel for elevating, receiving, weighing and discharging grain by means of floating or stationary elevators, in any city of the state containing a population of one hundred and thirty thousand or over, is not a taking of private property without due process of law, but is a valid exercise of the police power, as well in its application to elevators owned by private individuals as to those owned by companies having chartered privileges from the state, since the business, as carried on, is affected with a public interest, and is a practical monopoly.

3. The further provision that, in transferring grain to and from vessels and canal-boats, the charge for shoveling to the leg of the elevator when unloading and for trimming cargo when loading, shall be limited to the actual cost of the outside labor employed therein, does not render the act invalid, since under cover of a charge for this work the purpose of the statute might easily be evaded.

4. **LIMITING OF OPERATION OF ACT TO CITIES OF A SPECIFIED POPULATION. VALIDITY.** The fact that the operation of the act is limited to cities having a population of one hundred and thirty thousand or over, does not render it unconstitutional, as denying the equal protection of the laws.

5. **VALIDITY OF ACT AS AFFECTED BY QUESTIONS OF INTERSTATE COMMERCE.** The fact that the elevators are largely employed in the transfer of grain which is in course of transportation from the western states to the seaboard does not render the act obnoxious, as a regulation of interstate commerce.

**A**N error to the superior court of Buffalo, state of New York.  
**A**In error to the supreme court of the state of New York.  
**A**ffirmed.

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\* Reported in 50 N. W. Rep'r, 1117.

*Blair Lee* and *Spencer Clinton* for plaintiffs in error in *Budd v. People*. *C. F. Tabor*, attorney-general, and *G. T. Quimby* for defendants in error in same. *B. F. Tracy* and *W. N. Dykman* for plaintiffs in error in the other cases. *C. F. Tabor*, attorney-general, and *J. A. Hyland* for defendants in error in same.

Mr. Justice BLATCHFORD delivered the opinion of the court.

On the 9th of June, 1888, the governor of the state of New York approved an act, chapter 581 of the Laws of New York of 1888, which had been passed by the two houses of the legislature, three-fifths being present, entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this state." The act was in these words: "Section 1. The maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this state shall not exceed the following rates, namely: For elevating, receiving, weighing and discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships and canal-boats, shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading and trimming cargo when loading. § 2. Any person or persons violating the provisions of this act shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine of not less than two hundred and fifty dollars and costs thereof. § 3. Any person injured by the violation of the provisions of this act may sue for and recover any damages he may sustain against any person or persons violating said provisions. § 4. This act shall not apply to any village, town or city having less than one hundred and thirty thousand population. § 5. This act shall take effect immediately."

On the 26th of November, 1888, an indictment, which had been found by the grand jury of Erie county, New York, in the court of sessions of that county, against J. Talman Budd, for charging and receiving fees for elevating, receiving, weighing and discharging grain into and from a stationary elevator and warehouse, contrary to the provisions of said statute, came on trial



before a criminal term of the superior court of Buffalo, Erie county.

The charge in the indictment was that Budd, at Buffalo, on the 19th of September, 1888, being manager of the Wells elevator, which was an elevator and warehouse for receiving and discharging grain in the city of Buffalo, that city being a municipal corporation duly organized in pursuance of the laws of the state of New York and having a population of upward of one hundred and thirty thousand people, did receive, elevate and weigh from the propeller called the "Oceanica," the property of the Lehigh Valley Transportation Company, a body corporate, fifty-one thousand bushels of grain and corn, the property of said company, into the said Wells elevator, and unlawfully exacted from said company, for elevating, receiving, weighing and discharging said grain and corn, the sum of one cent a bushel, and also exacted from said company, for shoveling to the leg of the elevator, in the unloading of said fifty-one thousand bushels of grain and corn, \$1.75 for every one thousand bushels thereof, over and above the actual cost of such shoveling.

The facts set forth in the indictment were proved, and the defendant's counsel requested the court to instruct the jury to render a verdict of acquittal, on the ground that the prosecution was founded on a statute which was in conflict both with the constitution of the United States and with that of the state of New York; that the services rendered by Budd, for which the statute assumed to fix a price, were not public in their nature; that neither the persons rendering them, nor the elevator in question, had received any privilege from the legislature; and that such elevator was not a public warehouse, and received no license. The court declined to direct a verdict of acquittal, and the defendant excepted.

The court charged the jury that it was claimed by the prosecution that the defendant had violated the statute in charging more than five-eighths of one cent a bushel for elevating, receiving, weighing and discharging the grain, and in charging more than the actual cost of trimming or shoveling to the leg of the elevator, in unloading the propeller; that the statute was constitutional; and that the jury should find the defendant guilty as charged in the indictment, if they believed the facts which had been adduced.

The defendant excepted to that part of the charge which instructed the jury that they might find the defendant guilty of exacting an excessive rate for shoveling to the leg of the elevator, and also to that part which instructed the jury that they might convict the defendant for having exacted an excessive rate for elevating, receiving, weighing and discharging the grain and corn.

The jury brought in a verdict of guilty as charged in the indictment, and the court sentenced the defendant to pay a fine of \$250, and, in default thereof, to stand committed to the common jail of Erie county for a period not exceeding one day for each dollar of said fine. The defendant appealed from that judgment to the general term of the superior court of Buffalo, which affirmed the judgment. He then appealed to the court of appeals of New York, which affirmed the judgment of the superior court of Buffalo; and the latter court afterward entered a judgment making the judgment of the court of appeals its judgment. The defendant then sued out from this court a writ of error directed to the superior court of Buffalo.

The opinion of the court of appeals is reported in 117 N. Y. 1; 22 N. E. Rep'r, 670. It was delivered by Judge Andrews, with whom Chief Judge Ruger and Judges Earl, Danforth and Finch concurred. Judges Peckham and Gray dissented, Judge Gray giving a dissenting opinion, and Judge Peckham adhering to the dissenting opinion which he gave in the case of *People v. Walsh*, 117 N. Y. 621; 22 N. E. Rep'r, 682.

On the 22d of June, 1888, a complaint on oath was made before Andrew Walsh, police justice of the city of Brooklyn, N. Y., that on the preceding day one Edward Annan, a resident of that city, had violated the provisions of chapter 581 of the Laws of New York of 1888, by exacting from the complainant more than five-eighths of one cent per bushel for elevating, weighing, receiving and discharging a boat-load of grain from a canal-boat to an ocean steamer, and by exacting from the canal-boat and its owner more than the actual cost of trimming or shoveling to the leg of the elevator, and by charging against the ocean steamer more than the actual cost of trimming the cargo, the services being rendered by a floating elevator of which Annan was part owner and one of the agents. On this complaint, Annan was arrested and brought before the police justice, who took

testimony in the case, and committed Annan to the custody of the sheriff of the county of Kings to answer the charge before a court of special sessions in the city of Brooklyn. Thereupon writs of *habeas corpus* and *certiorari* were granted by the supreme court of the state of New York, on the application of Annan, returnable before the general term of that court in the first instance; but, on a hearing thereon, the writs were dismissed, and Annan was remanded to the custody of the sheriff. The opinion of the general term is reported in 2 N. Y. Supp. 275. Annan appealed to the court of appeals, which affirmed the order of the general term (117 N. Y. 621; 22 N. E. Rep'r, 682), for the reasons set forth in the opinion in the Case of Budd, 117 N. Y. 1; 22 N. E. Rep'r, 670; and the judgment of the court of appeals was afterward made the judgment of the supreme court. Annan sued out a writ of error from this court, directed to the supreme court of the state of New York.

Like proceedings to the foregoing were had in the case of one Francis E. Pinto, the charge against him being that he had exacted from the complainant more than five-eighths of one cent per bushel for receiving and weighing a cargo of grain from a boat into the Pinto stores, of which he was lessee and manager, the same being a stationary grain elevator on land in the city of Brooklyn, N. Y., and had exacted more than the actual cost of trimming or shoveling to the leg of the elevator. Pinto sued out from this court a writ of error to the supreme court of the state of New York.

The main question involved in these cases is whether this court will adhere to its decision in *Munn v. Illinois*, 94 U. S. 113.

The court of appeals of New York, in *People v. Budd*, 117 N. Y. 1; 22 N. E. Rep'r, 670, held that chapter 581 of the Laws of 1888 did not violate the constitutional guaranty protecting private property, but was a legitimate exercise of the police power of the state over a business affected with a public interest. In regard to the indictment against Budd, it held that the charge of exacting more than the statute rate for elevating was proved, and that as to the alleged overcharge for shoveling, it appeared that the carrier was compelled to pay \$4 for each one thousand bushels of grain, which was the charge of the shovelers' union, by which the work was performed, and that the union paid the

elevator, for the use of the latter's steam shovel, \$1.75 for each one thousand bushels. The court held that there was no error in submitting to the jury the question as to the overcharge for shoveling; that the intention of the statute was to confine the charge to the "actual cost" of the outside labor required; and that a violation of the act in that particular was proved; but that, as the verdict and sentence were justified by proof of the overcharge for elevating, even if the alleged overcharge for shoveling was not made out, the ruling of the superior court of Buffalo could not have prejudiced Budd. Of course, this court, in these cases, can consider only the federal questions involved.

It is claimed, on behalf of Budd, that the statute of the state of New York is unconstitutional, because contrary to the provisions of section 1 of the fourteenth amendment to the constitution of the United States, in depriving the citizen of his property without due process of law; that it is unconstitutional in fixing the maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses at five-eighths of one cent a bushel, and in forbidding the citizen to make any profit upon the use of his property or labor; and that the police power of the state extends only to property or business which is devoted by its owner to the public by a grant to the public of the right to demand its use. It is claimed on behalf of Annan and Pinto that floating and stationary elevators in the port of New York are private property, not affected with any public interest, and not subject to the regulation of rates.

"Trimming" in the canal-boat, spoken of in the statute, is shoveling the grain from one place to another, and is done by longshoremen with scoops or shovels; and "trimming" the ship's cargo when loading is stowing it and securing it for the voyage. Floating elevators are, primarily, boats. Some are scows, and have to be towed from place to place by steam tugs but the majority are propellers. When the floating elevator arrives at the ship, and makes fast along side of her, the canal-boat carrying the grain is made fast on the other side of the elevator. A long wooden tube, called "the leg of the elevator," and spoken of in the statute, is lowered from the tower of the

elevator so that its lower end enters the hold of the canal-boat in the midst of the grain. The "spout" of the elevator is lowered into the ship's hold. The machinery of the elevator is then set in motion, the grain is elevated out of the canal-boat, received and weighed in the elevator, and discharged into the ship. The grain is lifted in "buckets" fastened to an endless belt, which moves up and down in the leg of the elevator. The lower end of the leg is buried in the grain so that the buckets are submerged in it. As the belt moves, each bucket goes up full of grain, and at the upper end of the leg, in the elevator tower, empties its contents into the hopper which receives the grain. The operation would cease unless the grain was trimmed or shoveled to the leg as fast as it is carried up by the buckets. There is a gang of longshoremen who shovel the grain from all parts of the hold of the canal-boat to "the leg of the elevator," so that the buckets may be always covered with grain at the lower end of the leg. This "trimming or shoveling to the leg of the elevator," when the canal-boat is unloading, is that part of the work which the elevator owner is required to do at the "actual cost."

In the Budd and Pinto Cases the elevator was a stationary one, on land; and in the Annan Case it was a floating elevator. In the Budd Case the court of appeals held that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling, and the ordinary expense of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner were permitted to separate the services and charge for the use of the steam-shovel any sum which might be agreed upon between him and the shovelers' union, and thereby, under color of charging for the use of his steam-shovel, exact from the carrier a sum for elevating beyond the rate fixed therefor by the statute.

The court of appeals, in its opinion in the Budd Case, considered fully the question as to whether the legislature had power, under the constitution of the state of New York, to prescribe a maximum charge for elevating grain by stationary elevators,

owned by individuals or corporations who had appropriated their property to that use, and were engaged in that business; and it answered the inquiry in the affirmative. It also reviewed the case of *Munn v. Illinois*, 94 U. S. 113, and arrived at the conclusion that this court there held that the legislation in question in that case was a lawful exercise of legislative power, and did not infringe that clause of the fourteenth amendment to the constitution of the United States which provides that no state shall "deprive any person of life, liberty or property without due process of law;" and that the legislation in question in that case was similar to, and not distinguishable in principle from, the act of the state of New York.

In regard to *Munn v. Illinois* the court of appeals said that the question in that case was raised by an individual owning an elevator and warehouse in Chicago, erected for, and in connection with which he had carried on, the business of elevating and storing grain many years prior to the passage of the act in question, and prior also to the adoption of the amendment to the constitution of Illinois, in 1870, declaring all elevators and warehouses where grain or other property is stored for a compensation to be public warehouses. The court of appeals then cited the cases of *People v. Railroad Co.*, 70 N. Y. 569; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Buffalo E. S. R. Co v. Buffalo St. R. Co.*, 111 N. Y. 132; 19 N. E. Rep'r, 63; and *People v. King*, 110 N. Y. 418; 18 N. E. Rep'r, 245 — as cases in which *Munn v. Illinois* had been referred to by it, and said that it could not overrule and disregard *Munn v. Illinois* without subverting the principle of its own decision in *People v. King*, and certainly not without disregarding many of its deliberate expressions in approval of the principle of *Munn v. Illinois*.

The court of appeals further examined the question whether the power of the legislature to regulate the charge for elevating grain, where the business was carried on by individuals upon their own premises, fell within the scope of the police power, and whether the statute in question was necessary for the public welfare. It affirmed that, while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services, or interfere with freedom of contract, and while the

merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which, by the common law and the practice of free governments, justified legislative control and regulation in the particular case, so that the statute would be constitutional; that the control which, by common law and by statute, was exercised over common carriers, was conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it; that about one hundred and twenty million bushels of grain come annually to Buffalo from the west; that the business of elevating grain at Buffalo is connected mainly with lake and canal transportation; that the grain received at New York in 1887 by way of the Erie canal and Hudson river, during the season of canal navigation, exceeded forty-six million bushels—an amount very largely in excess of the grain received during the same period by rail, and by river and coast-wise vessels; that the elevation of that grain from lake vessels to canal-boats takes place at Buffalo, where there are thirty or forty elevators, stationary and floating; that a large proportion of the surplus cereals of the country passes through the elevators at Buffalo, and finds its way through the Erie canal and Hudson river to the seaboard at New York, where it is distributed to the markets of the world; that the business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities in the business of the common carrier, and in a broad sense performing the work of carriers, being located upon or adjacent to the waters of the state, and transferring the cargoes of grain from the lake vessels

to the canal-boats, or from the canal-boats to the ocean vessels, and thereby performing an essential service in transportation ; that by their means the transportation of grain by water from the upper lakes to the seaboard is rendered possible ; that the business of elevating grain thus has a vital relation to commerce in one of its most important aspects ; that every excessive charge made in the course of the transportation of grain is a tax upon commerce ; that the public has a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation ; and that whatever impaired the usefulness of the Erie canal as a highway of commerce involved the public interest.

The court of appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of Lord Chief Justice Hale, in his treatise *De Portibus Maris* (Harg. Law Tracts, 78) ; that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen and hackmen, and interest on the use of money ; that the underlying principle was that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation ; and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the Erie canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the state, and the practice of legislation in analogous cases, collectively creating an exceptional case and justifying legislative regulation.

The opinion further said that the criticism to which the case of *Munn v. Illinois* had been subjected proceeded mainly upon a limited and strict construction and definition of the police power ; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances, as they arise, calling for legislative intervention in the public interest ; and that no serious invasion of constitutional guaranty by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come



sooner or later to the side of law, order and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberration might have marked its course..

We regard these views which we have referred to as announced by the court of appeals of New York, so far as they support the validity of the statute in question, as sound and just.

In *Munn v. Illinois* the constitution of Illinois, adopted in 1870, provided in article 13, section 1, as follows: "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separated or not, are declared to be public warehouses;" and the act of the legislature of Illinois approved April 25, 1871 (Public Laws of Illinois of 1871-72, p. 762), divided public warehouses into three classes, prescribed the taking of a license, and the giving of a bond, and fixed a maximum charge for warehouses belonging to class A, for storing and handling grain, including the cost of receiving and delivering, and imposed a fine on conviction for not taking the license or not giving the bond. *Munn* and *Scott* were indicted, convicted and fined for not taking out the license, and not giving the bond, and for charging rates for storing and handling grain higher than those established by the act. Section 6 of the act provided that it should be the duty of every warehouseman of class A to receive for storage any grain that might be tendered to him. *Munn* and *Scott* were the managers and lessees of a public warehouse, such as was named in the statute. The supreme court of Illinois having affirmed the judgment of conviction against them, on the ground that the statute of Illinois was a valid and constitutional enactment (*Munn v. People*, 69 Ill. 80), they sued out a writ of error from this court, and contended that the provisions of the sections of the statute of Illinois which they were charged with having violated were repugnant to the third clause of section 8 of article 1, and the sixth clause of section 9 of article 1, of the constitution of the United States, and to the fifth and fourteenth amendments of that constitution.

This court, in *Munn v. Illinois*, the opinion being delivered by Chief Justice Waite, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the fourteenth amendment. It said that, under the powers of government inherent in every sovereignty,

"the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good;" and that, "in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold." It was added: "To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." It announced as its conclusions that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law; that, when private property was devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, inn-keeper, wharfinger, baker, cartman or hackney coachman;" that they stood in the very gateway of commerce, and took toll from all who passed; that their business tended "to a common charge," and had become a thing of public interest and use; that the toll on the grain was a common charge; and that, according to Lord Chief Justice Hale, every such warehouseman "ought to be under a public regulation, viz.," that he "take but reasonable toll."

This court further held, in *Munn v. Illinois*, that the business in question was one in which the whole public had a direct and positive interest; that the statute of Illinois simply extended the law so as to meet a new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses, and established their business before the regulations complained

of were adopted ; that, the property being clothed with a public interest, what was a reasonable compensation for its use was not a judicial, but a legislative, question ; that, in countries where the common law prevailed, it had been customary from time immemorial for the legislature to declare what should be a reasonable compensation under such circumstances, or to fix a maximum, beyond which any charge made would be unreasonable ; that the warehouses of Munn and Scott were situated in Illinois, and their business was carried on exclusively in that state ; that the warehouses were no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another ; that their regulation was a thing of domestic concern ; that, until congress acted in reference to their interstate relations, the state might exercise all the powers of government over them, even though in so doing it might operate indirectly upon commerce outside its immediate jurisdiction ; and that the provision of section 9 of article 1 of the constitution of the United States operated only as a limitation of the powers of congress, and did not affect the states in the regulation of their domestic affairs. The final conclusion of the court was that the act of Illinois was not repugnant to the constitution of the United States, and the judgment was affirmed.

In *Sinking Fund Cases*, 99 U. S. 700, 747, Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn v. Illinois*, speaking of that case, said : " The inquiry there was as to the extent of the police power in cases where the public interest is affected, and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community—it is subject to regulation by the legislative power." Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice Bradley regarded as the principle of the decision in *Munn v. Illinois*.

In *Water-Works v. Shottler*, 110 U. S. 347 3544 ; Sup. Ct. Rep'r. 48, this court said " that it is within the power of the government to regulate the prices at which water shall be sold by one who

enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In *Railroad Co. v. Illinois*, 118 U. S. 557, 569; 7 Sup. Ct. Rep'r, 4, Mr. Justice Miller, who had concurred in the judgment in *Munn v. Illinois*, referred, in delivering the opinion of the court, to that case, and said: "That case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any state whatever, and free from the question of continuous transportation through several states. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In *Dow v. Beidelman*, 125 U. S. 680, 686; 8 Sup. Ct. Rep'r, 1028, it was said by Mr. Justice Gray, in delivering the opinion of the court, that in *Munn v. Illinois*, the court, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," said that to limit the rate of charges for services rendered in the public employment, or for the use of property in which the public has an interest, was only changing a regulation which existed before, and established no new principle in the law, but only gave a new effect to an old one.

In *Railroad Co. v. Minnesota*, 134 U. S. 418, 461; 10 Sup. Ct. Rep'r, 462, it was said by Mr. Justice Bradley, in his dissenting opinion, in which Mr. Justice Gray and Mr. Justice Lamar concurred, that the decision of the court in that case practically overruled *Munn v. Illinois*; but the opinion of the court did not say so, nor did it refer to *Munn v. Illinois*; and we are of opinion

that the decision in the case in 134 U. S. ; 10 Sup. Ct. Rep'r, is, as will be hereafter shown, quite distinguishable from the present cases.

It is thus apparent that this court has adhered to the decision in *Munn v. Illinois*, and to the doctrines announced in the opinion of the court in that case ; and those doctrines have since been repeatedly enforced in the decisions of the courts of the states.

In *Lake Shore, etc., Ry. v. Cincinnati, S. & C. Ry.*, 30 Ohio St. 604, 616, in 1877, it was said, citing *Munn v. Illinois*: "When the owner of property devotes it to a public use, he, in effect, grants to the public an interest in such use, and must, to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use." That was a decision by the supreme court commission of Ohio.

In *State v. Gas Co.*, 34 Ohio St. 572, 582, in 1878, *Munn v. Illinois* was cited with approval, as holding that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use ; and the court added that in *Munn v. Illinois* the principle was applied to warehousemen engaged in receiving and storing grain ; that it was held that their rates of charges were subject to legislative regulation ; and that the principle applied with greater force to corporations when they were invested with franchises to be exercised to subserve the public interest.

The supreme court of Illinois, in *Ruggles v. People*, 91 Ill. 256, 262, in 1878, cited *Munn v. People*, 69 Ill. 80, which was affirmed in *Munn v. Illinois*, as holding that it was competent for the general assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling and shipping grain, and that, too, when such persons had derived no special privileges from the state, but were, as citizens of the state, exercising the business of storing and handling grain for individuals.

The supreme court of Alabama, in *Davis v. State*, 68 Ala. 58, in 1880 held that a statute declaring it unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the

owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. Against the argument that the statute was such a despotic interference with the rights of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law," the court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police regulation, to which there was no constitutional objection, citing *Munn v. Illinois*. It added that the object of the statute was to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the law-making power, might do much to demoralize agricultural labor, and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory.

In *Baker v. State*, 54 Wis. 368, 373; 12 N. W. Rep'r, 12, in 1882, *Munn v. Illinois* was cited with approval by the supreme court of Wisconsin, as holding that the legislature of Illinois had power to regulate public warehouses, and the warehousing and inspection of grain within that state, and to enforce its regulations by penalties, and that such legislation was not in conflict with any provision of the federal constitution.

The court of appeals of Kentucky, in 1882, in *Nash v. Page*, 80 Ky. 539, 545, cited *Munn v. Illinois*, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.

In 1884, the supreme court of Pennsylvania, in *Girard Storage Co. v. Southwark Co.*, 105 Penn. St. 248, 252, cited *Munn v. Illinois* as involving the rights of a private person, and said that the principle involved in the ruling of this court was that, where the owner of such property, as a warehouse, devoted it to a use in which the public had an interest, he in effect granted to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by the public for the common good, as long as he maintained that use.

In *Sawyer v. Davis*, 136 Mass. 239, in 1884, the supreme judicial court of Massachusetts said that nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced; and *Munn v. Illinois* was cited as holding that the rules of the common law which had from time to time been established, declaring or limiting the right to use or enjoy property, might themselves be changed, as occasion might require.

The supreme court of Indiana, in 1885, in *Brechbill v. Randall*, 102 Ind. 528; 1 N. E. Rep'r, 362, held that a statute was valid which required persons selling patent-rights to file with the clerk of the county a copy of the patent, with an affidavit of genuineness and authority to sell, on the ground that the state had power to make police regulations for the protection of its citizens against fraud and imposition; and the court cited *Munn v. Illinois* as authority.

The supreme court of Nebraska, in 1885, in *Webster Telephone Case*, 17 Neb. 126; 22 N. W. Rep'r, 237, held that when a corporation or person assumed and undertook to supply a public demand, made necessary by the requirements of the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination; and *Munn v. Illinois* was cited by the prevailing party and by the court. The defendant was a corporation, and had assumed to act in a capacity which was to a great extent public, and had undertaken to satisfy a public want or necessity, although it did not possess any special privileges by statute or any monopoly of business in a given territory; yet it was held that, from the very nature and character of its business, it had a monopoly of the business which it transacted. The court said that no statute had been deemed necessary to aid the courts in holding that where a person or company undertook to supply a public demand which was "affected with a public interest," it must supply all alike who occupied a like situation, and not discriminate in favor of or against any.

In *Stone v. Railroad Co.*, 62 Miss. 607, 639, the supreme court of Mississippi, in 1885, cited *Munn v. Illinois* as deciding that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, was a thing of domestic concern, and pertained to the state, and as affirming the right of the state to regulate the business of one engaged in a public employment therein, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

In *Hockett v. State*, 105 Ind. 250, 258; 5 N. E. Rep'r, 178, in 1885 the supreme court of Indiana held that a statute of the state which prescribed the maximum price which a telephone company should charge for the use of its telephones was constitutional, and that in legal contemplation all the instruments and appliances used by a telephone company in the transaction of its business were devoted to a public use, and the property thus devoted became a legitimate subject of legislative regulation. It cited *Munn v. Illinois* as a leading case in support of that proposition, and said that, although that case had been the subject of comment and criticism, its authority as a precedent remained unshaken. This doctrine was confirmed in *Telephone Co. v. Bradbury*, 106 Ind. 1; 5 N. E. Rep'r, 721, in the same year, and in *Telephone Co. v. State*, 118 Ind. 194, 207; 19 N. E. Rep'r, 604, in 1888, in which latter case *Munn v. Illinois* was cited by the court.

In *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399, 414; 7 Atl. Rep'r, 809, in 1886, it was held that the telegraph and the telephone were public vehicles of intelligence, and those who owned or controlled them could no more refuse to perform impartially the functions which they had assumed to discharge than a railway company, as a common carrier, could rightfully refuse to perform its duty to the public; and that the legislature of the state had full power to regulate the services of telephone companies, as to the parties to whom facilities should be furnished. The court cited *Munn v. Illinois*, and said that it could no longer be controverted that the legislature of a state had full power to regulate and control, at least within reasonable limits, public employments and property used in connection therewith; that the operation of the telegraph and telephone in doing a general business was a public employment and the instruments



and appliances used were property devoted to a public use, and in which the public had an interest; and that, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good.

In the court of chancery of New Jersey, in 1889, in *Delaware, etc., R. Co. v. Central Stock-Yard Co.*, 45 N. J. Eq. 50, 60; 17 Atl. Rep'r, 146, it was held that the legislature had power to declare what services warehousemen should render to the public, and to fix the compensation that might be demanded for such services; and the court cited *Munn v. Illinois* as properly holding that warehouses for the storage of grain must be regarded as so far public in their nature as to be subject to legislative control, and that, when a citizen devoted his property to a use in which the public had an interest he, in effect, granted to the public an interest in that use, and rendered himself subject to control in that use by the body politic.

In *Zanesville v. Gas-Light Co.*, 47 Ohio St. 1; 23 N. E. Rep'r, 55, in 1889, it was said by the supreme court of Ohio that the principle was well established that, where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use, and that such was the point of the decision in *Munn v. Illinois*.

We must regard the principle maintained in *Munn v. Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, as well as in respect to the charge for trimming and shoveling to the leg of the elevator when loading, and trimming the cargo when loaded. If the shovelers or scoopers chose, they might do the shoveling by hand, or might use a steam-shovel. A steam-shovel is owned by the elevator owner, and the power for operating it is furnished by the engine of the elevator; and if the scooper uses the steam-shovel, he pays the elevator owner for the use of it.

The answer to the suggestion that by the statute the elevator owner is forbidden to make any profit from the business of shoveling to the leg of the elevator is that made by the court of appeals

of New York in the case of Budd, that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator owner beyond the sum specified for the use of his machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner was permitted to separate the services, and to charge for the use of his steam shovel any sum which might be agreed upon between himself and the shovelers' union, and thereby, under color of charging for the use of his steam-shovel, to exact of the carrier a sum for elevating beyond the rate fixed by the statute.

We are of opinion that the act of the legislature of New York is not contrary to the fourteenth amendment to the constitution of the United States, and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual cost thereof; and that it is a proper exercise of the police power of the state.

On the testimony in the cases before us, the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers. The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

It is contended in the briefs for the plaintiffs in error in the *Annan and Pinto Cases* that the business of the relators in handling grain was wholly private, and not subject to regulation by law; and that they had received from the state no charter, no privileges, and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any other individual in the community. But these same facts existed in *Munn v. Illinois*. In that case, the parties offending were private individuals, doing a private business, without any privilege or monopoly granted to them by the state. Not only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a *quasi* public character. The act is also constitutional as an exercise of the police power of the state.

So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn v. Illinois*. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the state, and other kindred laws.

It is further contended that, under the decision of this court in *Railway Co. v. Minnesota*, 134 U. S. 418; 10 Sup. Ct. Rep'r, 462, the fixing of elevator charges is a judicial question, as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges; and that, by the statute under consideration, an arbitrary rate is fixed, and all inquiry is precluded as to whether that rate is reasonable or not.

But this is a misapprehension of the decision of this court in the case referred to. In that case the legislature of Minnesota had passed an act which established a railroad and warehouse commission, and the supreme court of that state had interpreted the act as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as

to the reasonableness of such rates. A railroad company, in answer to an application for a *mandamus*, contended that such rates in regard to it were unreasonable, and, as it was not allowed by the state court to put in testimony in support of its answer, on the question of the reasonableness of such rates, this court held that the statute was in conflict with the constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws. That was a very different case from one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the legislature. See *Spencer v. Merchant*, 125 U. S. 345, 356; 8 Sup. Ct. Rep'r, 921. What was said in the opinion of the court in 134 U. S.; 10 Sup. Ct. Rep'r, had reference only to the case then before the court, and to charges fixed by a commission appointed under an act of the legislature, under a constitution of the state which provided that all corporations, being common carriers, should be bound to carry "on equal and reasonable terms," and under a statute which provided that all charges made by a common carrier for the transportation of passengers or property should be "equal and reasonable."

What was said in the opinion in 134 U. S.; 10 Sup. Ct. Rep'r, as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois in *Munn v. Illinois*, but the doctrine was laid down by this court in *Railway Co. v. Illinois*, 118 U. S. 557, 568; 7 Sup. Ct. Rep'r, 4, that it was the right of a state to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in *Dow v. Beidleman*, 125 U. S. 680, 686; 8 Sup. Ct. Rep'r, 1028, it was said that it was within the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable.

But in *Dow v. Beidleman*, after citing *Munn v. Illinois*, 94 U. S. 113; *Railroad Co. v. Iowa*, 94 U. S. 155, 161, 162; *Peik v.*

Railway, 94 U. S. 164, 178; Railroad v. Ackley, 94 U. S. 179; Railroad v. Blake, 94 U. S. 180; Stone v. Wisconsin, 94 U. S. 181; Ruggles v. Illinois, 108 U. S. 526; 2 Sup. Ct. Rep'r, 832; Railroad Co. v. Illinois, 108 U. S. 541; 2 Sup. Ct. Rep'r, 839; Stone v. Trust Co., 116 U. S. 307; 6 Sup. Ct. Rep'r, 334, 388, 1191; Stone v. Illinois Cent. R. Co., 116 U. S. 347; 6 Sup. Ct. Rep'r, 348, 388, 1191, and Stone v. New Orleans & N. E. R. Co., 116 U. S. 352; 6 Sup. Ct. Rep'r, 349, 391 — as recognizing the doctrine that the legislature may itself fix a maximum, beyond which any charge would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law, the court said that it had no means, "if it would under any circumstances have the power," of determining that the rate fixed by the legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law, or that there had been any denial of the equal protection of the laws.

In the cases before us the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable.

In *Banking Co. v. Smith*, 128 U. S. 174, 179; 9 Sup. Ct. Rep'r, 47, in the opinion of the court, delivered by Mr. Justice Field, it was said that this court had adjudged in numerous instances that the legislature of a state had the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any contract to the contrary, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.

It is further contended for the plaintiffs in error that the statute in question violates the fourteenth amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies only to places which have one hundred and thirty thousand population, or more, and does not apply to places which have less than one hundred and thirty thousand population, and thus operates against elevator owners in the larger cities of the state. The law operates equally on all elevator owners in places having one hundred and thirty thousand population, or more; and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the fourteenth amendment. Judgments affirmed.

Mr. Justice BREWER (dissenting). I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of *Munn v. Illinois*, 94 U. S. 113, reaffirmed. That is, as declared in the syllabus and stated in the opinion in that case: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interests he has thus created." The elaborate discussions of the question in the dissenting opinions in that case, and the present cases, when under consideration in the court of appeals of the state of New York, seem to forbid any thing more than a general declaration of dissent. The vice of the doctrine is that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public, in its organized capacity, to-wit, the state, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it and the individual creating it is doing thereby and *pro tanto* the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work, he is *pro tanto* doing the work of the state. He devotes his property to a public use. The state doing the work fixes the price for the use. It does not lose the right to fix the price be-

cause an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Every thing, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That which is true of the single small store in the village is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. I cannot bring myself to believe that when the owner of property has by his industry, skill and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value, nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.

Surely the matters in which the public has the most interest are the supplies of food and clothing; yet can it be that by reason of this interest the state may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights — "life, liberty and the pursuit of happiness;" and to "secure," not grant or create, these rights, governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: *First*, that he shall not use it to his neighbor's injury and that does not mean

that he must use it for his neighbor's benefit; *second*, that if he devotes it to a public use, he gives to the public a right to control that use; and, *third*, that whenever the public needs require, the public may take it upon payment of due compensation.

It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly — one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break, and, being the creation of law, justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where any one, by his money and labor, furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has, therefore, a monopoly of that business; but it is a monopoly of fact, which any one can break, who, with like business courage, puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, any one can build another; the field is open for all the elevators, and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break.

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property, which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And, if so, "Looking Backward" is nearer than a dream.

I dissent especially in these cases, because the statute in effect compels service without any compensation. It provides that the parties seeking the service of the elevator "shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading." This work of trimming or shoveling is



fully explained in the briefs of counsel. It is work performed by longshoremen, with hand-scoops or shovels, on the vessel unloading or receiving the grain. They are not in the regular employ of the elevator, but engaged in an independent service, and yet one whose careful and skillful performance is essential to the successful transfer of grain into and through the elevator. The full service required of the elevator compels its proprietor to employ and superintend the work of these longshoremen. For this work of employment and superintendence, and for the responsibility for the proper performance of their work, the act says that the proprietor of the elevators shall receive no compensation; he can charge only that which he pays out—the actual cost. I had supposed that no man could be required to render any service to another individual without some compensation.

Again, in the Pinto Case, it appears that Mr. Pinto is the owner of a stationary elevator, built on private grounds. It is not on grounds devoted to a public use, like the right of way of a railroad company. There is nothing to indicate on his part a purpose to dedicate his property to public uses. So far as it is possible to make the business of an elevator a purely private business he has done so. It will not do to say that the transferring of grain through an elevator is one step in the process of transportation, and that, therefore, they are *quasi* common carriers discharging a public duty, and subject to public control. They are not carriers in any proper sense of the term. They may facilitate carriage; so does the boxing and packing of goods for transportation. The engineers, firemen, brakemen, and all the thousands of employes of a railroad company are helping the business of transportation; but are they all common carriers simply because their work tends to facilitate the business of transportation, and may the legislature regulate their wages?

But, as I said, I do not care to enter into any extended discussion of the matter. I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property, or the performance of his personal services, will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it

grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use.\*

Mr. Justice Field and Mr. Justice Brown concur with me in this dissent.

**1. Police power — regulation of charges — business affected with a public interest.**— The foregoing case, although not strictly a railroad or corporation case, yet in its discussion deals almost wholly with railroad and corporation decisions and determines questions of vital importance to all railroads and corporations. The business to which the case relates is also one which is largely, if not mostly, in the hands of corporations. We deem this a sufficient justification, if any is needed, for including the case in these reports.

The power of the legislature to regulate charges is considered at length in note to Chicago, etc., *R. Co. v. Minnesota*, 2 Am. R. R. & Corp. Rep. 564, 596; also in note to *Wellman v. Chicago & Grand Trunk R. Co.*, 3 Am. R. R. & Corp. Rep. 703, 731. Other cases upon the same subject are *Spring Valley Water-Works v. San Francisco*, 1 Am. R. R. & Corp. Rep. 96; *Chicago & Grand Trunk R. Co. v. Wellman*, post.

**2. State regulation of foreign railroad doing business therein.**— The Constitution of Arkansas, article 12, section 6, provides that corporations may be formed under general laws, which may be altered or repealed; that the general assembly shall have power to alter or revoke the charter of any corporation, provided that "no injustice shall be done to the corporators." Section 11 provides that foreign corporations doing business in the state shall be subject to the same limitations and regulations as domestic, and shall not exercise any greater privileges or franchises than they do. Held, that a foreign railway company, having entered the state to operate a road after the above provisions were in force, was subject to legislation reducing passenger rates, provided, only, such reduction did no injustice to the corporators. *St. Louis, etc., R. Co. v. Gill*, 54 Ark. 101; 15 S. W. Rep'r, 18. Held, also, that the company could not claim immunity from state regulation in respect to rates because its right of way was granted by the government, which declared it to be a post and military route, and national highway for governmental service. *Id.*

**3. Criterion for determining reasonableness of rates.**— The question as to the justice of the regulation of passenger rates must be determined by its effect on the net earnings of the entire line operated by defendant company, and not by its effect on the net earnings of any given subdivision of the whole line, even though such subdivision was formerly a separate road, owned by a different corporation, which was consolidated with defendant. *Id.*

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\* Reported in 12 Sup. Ct. Rep'r, 468; 143 U. S. 517.

## CHICAGO &amp; GRAND TRUNK R. CO. V. WELLMAN.

(Supreme Court of the United States, Feb. 20, 1882.)

1. **RAILROAD COMPANIES. REGULATION OF CHARGES. POWER OF THE STATES.** State legislatures have power to fix maximum rates of railroad passenger fare, and the courts can only interfere therewith to protect the roads from unreasonable rates. *Stone v. Trust Co.*, 6 Sup. Ct. Rep'r, 334, 338, 1191; 116 U. S. 307, and *Railway Co. v. Minnesota*, 10 Sup. Ct. Rep'r, 462; 134 U. S. 418, followed.

2. The Acts of Michigan 1889, No. 202, fixes a maximum rate of two cents per mile on all railroads whose gross yearly passenger earnings exceed \$3,000, but make no regulations in regard to freight charges. Held, that, in an action in damages for a refusal to carry a passenger at the maximum rate, the court properly refused to instruct the jury that the law was unconstitutional in its application to the road in question, merely upon an agreed statement showing that its income at existing rates was entirely consumed by operating expenses and fixed charges, and the testimony of two of its officers that an increase of freight rates would diminish its income by throwing business to competing roads; since such an instruction required the court to hold that this testimony was conclusive in law, and to assume, as a matter of law, that a reduction in passenger fares would not bring an increase of travel sufficient to equalize the earnings.

3. **AMICABLE SUITS. WHETHER POWER OF COURT TO DECIDE UPON THE VALIDITY OF A STATUTE MAY BE INVOKED THEREBY.** The power of a court to pass upon the constitutionality of an act of the legislature should not be invoked by means of an amicable suit, especially where there is an agreed statement of facts. This power is the supreme judicial function, and its exercise is only legitimate in the last resort, in the determination of an earnest and vital controversy.

**I**N error to the supreme court of the state of Michigan. Action by Thomas Wellman against the Chicago and Grand Trunk Railway Company to recover damages for a refusal to carry him as a passenger. Verdict and judgment for plaintiff, which was affirmed by the state supreme court. Defendant brings error. Affirmed.

## STATEMENT BY MR. JUSTICE BREWER.

In 1889 the legislature of the state of Michigan passed an act, No. 202 of the Public Acts of that year, pages 282 and 283, by which, among other things, section 3323 of Howell's Statutes, being a part of the railroad law of that state, was amended. So far as affects the matters in controversy here, it is enough to quote from the ninth paragraph, referring to the powers and liabilities of railroad companies. That is as follows:

"*Ninth.* To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for transporting any passenger, and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, shall not exceed the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commissioner of railroads for the year one thousand eight hundred and eighty-eight, equalled or exceeded the sum of \$3,000 per mile of road operated by said company, two cents per mile; and for all companies the earnings of whose passenger trains, reported as aforesaid, were over \$2,000 and less than \$3,000 per mile of road operated by said company, two and a half cents per mile; and for all companies whose earnings, reported as aforesaid, were less than \$2,000 per mile of road operated by said company, three cents per mile."

Prior thereto the regular fare charged on plaintiff in error's road from Port Huron to Battle Creek was \$4.80, the distance being one hundred and fifty-nine and three-quarter miles. On the very day on which the law took effect, to-wit, October 2, 1889, the defendant in error, plaintiff below, went to the defendant's office in Port Huron, and tendered \$3.20 for a ticket from that place to Battle Creek, which was refused. Thereupon he brought this action in damages, to which the railroad company promptly answered; and on November 22, 1889, less than two months from the time the law went into effect, the case was tried, and a verdict and a judgment entered in favor of the defendant in error for the sum of \$101, an amount sufficient to take the case to the higher court. On the trial it was agreed that the railroad company's earnings on its passenger trains for the year 1888 exceeded \$3,000 per mile; that its capital stock was \$6,600,000, and had been fully paid in; that its bonded debt was \$12,000,000, one-half bearing six per cent and the other half five per cent interest, payable semi-annually; that the capital stock and mortgage debt represented an actual amount paid into the corporation; that the railroad property was at the time worth more than the capital stock and mortgage debt; and that, in addition to the mortgage debt, there was a floating debt of the amount of

\$896,906.40. Further, the following tabulated statement of the earnings and expenses for the year 1888 was admitted to be correct :

(7) That the total earnings and income of the defendant from all sources for the year 1888 was .....		\$3,228,338 17
Of this amount there was received from passenger traffic the sum of .....		\$1,065,502 94
And from freight traffic the sum of .....		2,160,180 23
From miscellaneous sources .....		2,655 00
		<u>\$3,228,338 17</u>
(8) The defendant's operating expenses for the year 1888 were .....		\$2,404,516 54
The interest paid on its bonds was .....		661,835 36
Other necessary expenses, including interest on part of the unfunded debt, rental of cars, tracks, etc .....		150,805 61
		<u>\$3,216,157 51</u>
(9) That, in addition to the foregoing expenses defendant paid during the year 1888 from its earnings, on account of interest on bonds not paid in previous years .....		12,257 94
		<u>\$3,228,415 45</u>

In addition to this agreed statement of facts, two witnesses were called, one the traffic manager and the other the treasurer of the plaintiff in error. Their testimony was substantially that, in view of the competition prevailing at Chicago for through business, it was impossible to increase the freight rates then charged by the company, because it would throw the volume of business into the hands of competing roads. Upon such agreed statement and testimony, and that alone, the railroad company asked an instruction that the act of 1889, referred to, was unconstitutional. The court refused this instruction, and an exception to the refusal to give this instruction was the solitary one taken on the trial. The court proceeded to charge the jury that the act in question was valid, and that the plaintiff was entitled to a verdict and judgment by reason of the failure of the defendant to comply with its provisions. To this charge no exceptions were taken, and the case went to the supreme court of the state on the single exception above stated. The court sustained the ruling of the

trial court, and affirmed its judgment (83 Mich. 592; 47 N. W. Rep'r, 489); to reverse which judgment the railroad company sued out a writ of error from this court.

*E. W. Meddough* and *Geo. F. Edmunds* for plaintiff in error.  
*Wm. T. Mitchell* for Wellman. *A. A. Ellis*, attorney-general,  
 for state of Michigan.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The single question presented on the record is, whether the trial court, on the facts presented, erred in refusing to instruct, as a matter of law, that the act of 1889 was unconstitutional. It will be noticed that that act does not interfere with the rates of freight; it simply regulates passenger fares; also that there was no agreement that the freight rates could not be so changed as to increase the revenues therefrom. There was in evidence the opinion of two gentlemen, doubtless well informed and worthy of credit, that an increase of freight rates was inexpedient and futile, and would tend to diminish, rather than increase, the income from freight. But the question was not submitted to the jury as to whether they believed that an increase of freight rates would work a reduction of the income from freight, nor even whether they believed that a reduction of the passenger tariff between Battle Creek and Port Huron would not so increase the travel as to increase the earnings therefrom; but the court was asked to peremptorily charge the jury that the law fixing the passenger rate was unconstitutional. In other words, the instruction asked amounted to this: that, as matter of law, the opinion of these two witnesses as to the effect of raising the freight tariff upon the earnings was conclusive; that, as like matter of law, the reduction of passenger tariffs would not so increase the amount of passenger business as to increase the revenues, but would, on the contrary, diminish the earnings therefrom; that such reduction would operate to so far diminish the earnings of the road as to prevent the payment of operating expenses and fixed charges; and, therefore, that the act was unconstitutional in its application to this company; or else that the legislature had no power in respect to the matter, and that an act prescribing maximum

rates was necessarily unconstitutional, although the rates authorized might be so high as to enable every company to pay therefrom all expenses and large dividends to stockholders.

In this connection it is worthy of note that while, by the agreed statement, the previous passenger rate between Port Huron and Battle Creek was \$4.80, which was the same rate per mile that defendant uniformly charged all other persons for transportation upon its road, yet from the report of the defendant, made to the state of its business for the year 1888, and which we are invited by its counsel to examine, it appears that the average rate of fare per mile for all passengers was \$.01.62, being thirty-eight hundredths less than the maximum rate fixed by the act in question.

Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and therefore the earnings? At any rate, must the court assume that it has no such effect, and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury, and decline to assume that the effect is as claimed? There can be but one answer to these questions. If the contention be that the legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer to the long series of cases in this court in which the contrary has been decided. The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates. *Stone v. Trust Co.*, 116 U. S. 307; 6 Sup. Ct. Rep'r, 334, 388, 1191; *Railway Co. v. Minnesota*, 134 U. S. 418; 10 Sup. Ct. Rep'r, 462.

The supreme court of Michigan, in passing upon the present case, felt constrained to make this observation :

"It being evident from the record that this was a friendly suit between the plaintiff and the defendant to test the constitutionality of this legislation, the attorney-general, when it was brought into this court upon writ of error, very properly interposed and secured counsel to represent the public interest. In the stipulation of facts or in the taking of testimony in the court below neither the attorney-general nor any other person interested for or employed in behalf of the people of the state took any part. What difference there might have been in the record had the people been represented in the court below, however, under our view of the case, is not of material inquiry."

Counsel for plaintiff in error, referring to this, does not question or deny, but says: "The attorney-general speaks of the case as evidently a friendly case, and Justice Morse, in his opinion, also so speaks of it. This may be conceded; but what of it? There is no ground for the claim that any fraud or trickery has been practiced in presenting the testimony."

We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

These observations are pertinent here. On the very day the act went into force the application for a ticket is made, a suit



commenced, and within two months a judgment obtained in the trial court; a judgment rendered, not upon the presentation of all the facts from the lips of witnesses, and a full inquiry into them, but upon an agreed statement which precludes inquiry into many things which necessarily largely enter into the determination of the matter in controversy. A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were \$2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries, fifty to one hundred thousand dollars to the president, and in like proportions to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for, if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this: that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call "operating expenses."

We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts. Judgment affirmed.\*

The decision of the supreme court of Michigan in this case is reported in 8 Am. R. R. & Corp. Rep. 708. See also the last case and note thereto.

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\* Reported in 12 Sup. Ct. Rep'r, 408; 142 U. S. 320.

## SWENTZEL ET AL. V. PENN BANK ET AL.

## APPEAL OF WARNER.

(Supreme Court of Pennsylvania, Jan. 4, 1892.)

1. **BANKING CORPORATIONS. LIABILITY OF DIRECTORS FOR LOSSES THROUGH THE FRAUDS OF OFFICERS. DEGREE OF CARE TO BE EXERCISED BY DIRECTORS.** A director of a bank, whose services are gratuitous and whose duties are to attend the bank once or twice a week to assist in discounting paper, to see how much money there is to loan, and once or twice a year to count the cash on hand, and examine the bills receivable and securities to see whether they correspond with the statement furnished by the officers, does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such gross negligence as amounts to fraud.

2. A bank president, abetted by the cashier and several clerks, embezzled almost all the funds of the bank, and concealed the fraud by false entries in the books. His statement to the directors from time to time showed the bank to be in good condition. No fraud was discoverable in any of the books except the individual ledger, which, by a rule of the bank conforming to a custom largely prevalent, the directors were not allowed to see. The directors were among the heaviest stockholders, and at the first suspension they raised nearly \$300,000 on their individual credit to enable the bank to resume payment. Held, that the directors were not guilty of gross negligence.

**A**PPPEAL from court of common pleas, Allegheny county. Action by E. W. Swentzel, Elias Unger, and others against the Penn Bank; W. N. Riddle, president; F. B. Laughlin, vice-president; G. L. Reiber, cashier; F. B. Laughlin, James Herdman, James H. Hopkins, D. W. C. Carroll, T. Brent Swearingen, Samuel Severance, Philip Reymer, Thomas Hare, George C. Davis, Frank Rahm, A. A. Hutchinson, J. O. Brown and A. M. Cavitt, directors of said bank, to recover for losses occasioned by the frauds of the president, cashier and certain clerks, which caused the insolvency of the bank. Decree that the directors were not liable. Henry Warner, assignee of the bank, appeals. Decree affirmed.

The following extract from the opinion of the lower court shows pretty fully the facts and evidence in the case: "The master has fully described the manner in which the cashier and president abstracted the money, and yet making the books balance by charging the abstractions as overdrafts in the end, largely to

fictitious persons, and in the formal statements to the directors omitting all statement of these overdrafts, and deducting them from the amount of deposits for which the bank was in fact liable. The individual ledger showed these overdrafts daily in red ink, and showed the true amount of the deposits. The balance-book showed all the balances correctly. It is an old story in fraudulently bankrupt banks in this community. In the numerous cases that have been before this court since the panic of 1873, this has been the usual process of taking the money under the eyes of the sleeping directors, without falsifying the books. This process went on in the Penn Bank. Each Monday morning a formal statement was laid before the directors which falsified the liabilities, often by several hundred thousand dollars, in the sublime faith of Mr. Riddle, in their unsuspecting credulity that they would not make a five minutes examination of the individual ledger, which would have shown the falsity of the statements, and at a rapid glance would have shown an alarming appearance of overdrafts to doubtful parties. In addition, for several years prior to the failure, Riddle published in most of the Pittsburgh papers, under oath of the cashier and attested by the names of three directors, from time to time, at least once in three months, statements of the assets and liabilities of the bank, which were close to a true statement of amounts, and which differed from these weekly statements by several hundred thousand dollars on each side; the difference being that the true amount of deposits as shown by the books appeared as liabilities, and the overdrafts appeared as 'demand loans.' They also printed and circulated in large numbers cards with the statement thereon as published in the papers. These cards were lying around in the bank. It is practically impossible that any of these directors who could read did not see both the publication in the papers and the cards. The enormous discrepancy between these published statements and the weekly statements furnished the directors would seem likely to attract the attention of any one interested. The directors admit they saw these published statements and cards, but did not examine them, and supposed they corresponded to the weekly statements. The master treats this evidence as though it were a question as to whether or not the depositors had been deceived by these published statements; and, as there is no evidence to that effect, he dismissed it as unimport-

ant. The significance of this testimony is that the published statements were true, except that overdrafts were called 'demand loans,' and the weekly statements were false. Plaintiff's counsel claim that these facts alone should have attracted the attention of reasonably careful and ordinarily intelligent directors, and put them on the very brief inquiry and examination necessary to detect the systematic fraud perpetrated on them by their officers in the weekly statements.

"The directors say, one and all, that overdrafts were 'not permitted' in the bank on any account or by any person, and that had been the rule under Mr. Hopkins' presidency as under that of Mr. Riddle. Therefore they had no reason to suspect overdrafts. And they gave in evidence, as strong proof of the fact, that in March, 1882, Mr. Riddle, then cashier (in the absence of Mr. Hopkins), reported to the board that Mr. Hopkins' account as trustee of the Pittsburgh Southern railroad was largely overdrawn, and that he (Riddle) would not stand by and see even his dear friend Hopkins overdraw without a protest. A committee was appointed to investigate, and require security, or rather to better secure the collateral pledged. The committee of the board took Riddle's word for every thing; did not look at the ledger to see how and when the account had been overdrawn. Had they done so, they would have discovered that the overdrafts were at different periods, and had continued for more than a year — Hopkins says from November, 1880,— and that numerous other accounts were largely overdrawn; that the overdrafts then were several hundred thousand dollars, and had been for a long time, and that it was a sudden spasm of counterfeit virtue that had come over Riddle. The matter is treated by the master as though the plaintiffs had introduced this testimony. 'No overdrafts were allowed, under any circumstances,' say the directors, and yet a majority of the directors were frequently overdrawn in their accounts — Cavitt, Hare, Reymer, Swearingen, Brown, Hutchinson, Severance, Carroll, Hopkins and Riddle. True, they explain the matter to show that no harm was done or intended, yet it remains true that they were, both in form and in fact, overdrawn. The directors assert that none of the executive officers of the bank were allowed to speculate in oil or engage in other speculative enterprises; and testify that when they learned that Mr. Reiber, their assistant cashier,

had been buying and selling oil, they reprimanded him, and exacted a promise that he would not again deal in oil while he remained in the bank. Reiber says he gave no such promise; that some of the directors congratulated him on his successful deal; and he continued to deal in it when he saw a good chance for profit. The vice-president, Laughlin, speculated largely in oil. The directors, Swearingen, Hopkins, Brown and Cavitt speculated in oil. The attorney for the bank got tips from Riddle about the great oil syndicate he was managing in 1883 to bull the market; bought and sold at a profit before the oil went down. He was also attorney for Riddle and for A. A. Hutchinson. The bank was head-quarters for oil brokers, many of whom kept their accounts in the bank—largely in the shape of overdrafts. Beall, the confidential agent of the syndicate, was openly in the bank building where telegrams were received and orders given. There was so strong an odor of oil speculation around the bank in 1882, '83, '84, that Dr. Van Voorhis, up in Fayette, Westmoreland county, heard 'the bank was engaged in an oil speculation, and had an inquiry of the bank's attorney made for a depositor.'

"The attorney asked Riddle if the bank was in it. He said, 'No,' and that was satisfactory. Mr. Carroll (a director) saw in the Pittsburgh Leader that the Penn Bank was engaged in the huge oil speculation which it was current report was going on. He asked Riddle, who said 'the bank was not in it.' That satisfied him. The vice-president, Mr. Laughlin, knew of the intended bulling the market in 1883, and Riddle told him he (Riddle) was to manage it for the syndicate, and the bank would make largely from the handling of the funds, but that the bank's funds were not being used for that purpose. He tells us he did not deem it necessary to inquire further, though he knew through Riddle that the syndicate, or some of its members, was in dire need of funds to protect margins in New York, as he (Laughlin) negotiated Riddle's private securities to raise the money, and gave Beall advice about what to do in New York; yet he did not deem it worth while to inquire further, or to examine the books of the bank to see that all was right, or to inform his co-directors of the surroundings of their great financier, Riddle. J. P. Beall, called by the defendants, testifies that while he, as sub-manager of the oil syndicate under Riddle, was doing business at the bank, Mr.

Laughlin, Mr. Brown, Mr. Cavitt, Mr. Hutchinson and Mr. Swearingen, of the directors, were frequently in his room, or rather in his office and in their room, and that they heard the consultations, had access to the papers and telegrams, and, in fact, he assumes in his testimony that he was doing the business for the bank. If Beall is to be believed, these directors had actual knowledge of the dealings. All except Mr. Laughlin deny and negative Beall's testimony as to their being in his room and consulting about the transactions. We give very little credit to the statements of Mr. Beall, either for or against the defendants. It seems to us that he told considerably more or less than he knew, and some things that he did not know.

"The directors give their reasons for confidence in Mr. Riddle (who, in one part of defendants' testimony, was not known to speculate), and, among their reasons, that they believed him in 1883 to be worth from \$250,000 to \$300,000. He came to them poor, and on a meager salary — even as president of the bank, only \$2,500; and they testify as to how he made his money while cashier of their bank, \$100,000 by being the promoter or getter-up of a telephone company; also made largely by being an original promoter of a silver mining company; and also by stock he got, without consideration, while treasurer of the railroad company whose stock he so received. And yet they did not suspect that Riddle engaged in dangerous speculative enterprises that might tempt him to use the bank's funds, or require them to make an examination of the individual ledger. The testimony incidentally and the books fully show that for at least three years this bank had been carrying on an exceedingly hazardous banking business. The officers had, no doubt, been active in procuring accounts, and the high reputation of the directors naturally aided in bringing depositors to the bank. They loaned considerably on oil certificates as collateral prior to August, 1880, the board passing on the notes and collaterals as regular discounts. August 26, 1880, at the request of Mr. Riddle, cashier, the board passed a resolution authorizing the officers to loan on oil certificate collateral, on a certain margin, varying with the price of oil, without application to the board. Some of the directors testify that their understanding was that the loans made by the officers under this resolution were to be reported to and passed on by the board the next day. The

resolution does not say so, and it does not appear that they were ever so reported. From that time the discounts by the board with oil collateral were small, and the loans by the bank officers, *i. e.*, Riddle, were large. The defendants' testimony shows that the usual way was to deposit oil certificates as collateral for checks to be drawn, without any regular discount, and then the checks would appear as overdrafts. From this custom the step was short and easy to allowing large overdrafts without the collateral, but on expectation or promise of collateral, and from that to wild speculation with the bank's funds on the part of the bank's officers, or by their permission to their favorite brokers. Cashier's checks were issued in large amounts and numbers for checks against already overdrawn accounts, and, in time, without checks, and then were charged to fictitious persons and firms, appearing on the individual ledger as overdrafts, and in the weekly statements furnished the directors, not appearing as assests, but diminishing the deposits by so much as there were overdrafts. The general ledger account of deposits, being merely the balance, was falsified to that extent. Cashier's checks multiplied, and apparently reached their maximum, in some huge speculations in the latter half of 1882. The testimony of F. M. Hayes, defendants' expert, gives the following list of cashier's checks issued for the Penn bank, as shown by its books:

1882.	Sept. 18	.....	\$1,295,703 84
"	"	14.....	1,044,193 00
"	"	15.....	961,068 00
"	"	18.....	1,223,303 00
"	"	19.....	1,316,890 00
"	Oct. 2.....		1,299,459 00
"	Nov. 4.....		1,917,267 00
"	"	6 (324 checks).....	3,542,804 00
"	"	7.....	3,403,702 00
"	"	8.....	1,421,128 00
"	"	9.....	1,132,028 00
"	"	10.....	2,777,743 00
"	"	11.....	1,219,982 00
"	"	13.....	1,283,856 00
"	"	14.....	997,803 00
"	"	15.....	1,004,559 00
"	"	16.....	694,412 00
"	"	17.....	1,158,792 00
"	"	18.....	2,014,371 00

1882.	Nov.	20.....	\$1,066,732 00
1883.	May	4.....	409,738 00
"	"	5.....	153,078 00
"	"	8.....	89,902 00
"	"	9.....	296,792 00
"	"	11.....	524,144 00
"	"	19.....	463,067 00
"	"	20.....	435,827 00
"	"	24.....	546,663 00
1884.	May	7.....	587,794 00
"	"	8 (Redeemed \$1,090,963).....	946,102 00
"	"	9 (Redeemed \$977,577).....	406,344 00

"An examination of Ledger F, beginning with January 7, 1882, shows a large amount of overdrafts, all, from day to day, marked in red ink, and only requiring a casual examination to see that they are numerous; that they are large, and indicate a condition of affairs that requires no intricate examination or calculation or an expert to show that the condition is dangerous. These overdrafts, very numerous and very large at the opening of the year, increased in number and amounts until in the latter part of the year they had swollen to an almost incredible amount. I have not taken time to foot them up accurately, but in September, October and November, when the largest amount of cashier's checks were issued, they certainly ran higher than in May, 1884, when the bank suspended — from \$1,000,000 to \$1,750,000. The testimony does not trace the cause, but no doubt it was a huge speculation, in which some of the bank's officers were probably interested. The entire funds and credit of the bank were risked, and only a fortunate or unfortunate series of accidents occurred, or the collapse would then have come. Defendants' counsel claim the bank was solvent at the 1st of January, 1883, and that nearly \$1,000,000 was lost July 18, 1883, for which they rely on Beall's testimony. This system of cashier's checks and overdrafts continued through Ledgers G and H to the suspension of the bank in May, 1884 — no concealment on the individual ledgers, but, on the other hand, the overdrafts appearing daily in red ink figures distinguished at a casual glance over the pages. For a considerable period cashier's checks were made out and signed, not only by the president and cashier, but by the tellers, some of the book-keepers, and even by the bank messenger, for large amounts, and often without any check to meet



it, but simply a charging memorandum left in the drawer. The directors never looked at the individual ledger; never discovered this irregular and wonderful issue of cashier's checks; nor did they discover that a large part of what was reported to them weekly as cash on hand was but charging memoranda carried in the teller's or cashier's drawers as cash. The president, the cashier, the tellers, the book-keepers, individual and general, and other clerks, knew of these irregularities of the "oil deal," and of the probably worthless overdrafts, but they never reported them to the directors, as a board or otherwise. Some excuse may be made for the tellers and book-keepers and clerks, as they seem to have believed that the bank and its directors were in the oil speculations, and that when they obeyed Riddle's orders they were obeying the directors. They should have made certain that each director knew it (and they should have resigned). Even after the first suspension, the general book-keeper made out a statement for the directors to present to representatives of other banks that he knew to be false, as it deducted the overdrafts from the actual deposits, and was silent as to overdrafts. The directors held semi-annual audits on the affairs of the bank; examined the general ledger to see if the balances had been taken off correctly, but did not examine the individual ledger. On at least one occasion, December 31, 1883, the bank's account with the Farmers' Deposit National Bank was shown them duly balanced in the pass-book, with a credit enhanced by the deposit of \$77,000 of checks borrowed by Riddle for the occasion, in a way in which the directors had no reason to suspect fraud in the balance. There is some evidence that on one occasion cash was borrowed for a similar purpose. The auditing committee in each case made their report showing a healthy condition of the bank; they 'had counted the cash, examined the notes,' etc. They counted 'cash items' as cash. I suspect they counted the same cash more than once, without knowing it. Audit occasions were undoubtedly prepared for by putting palpable matters in apparently good shape, in full faith that the auditing committee would not be critical or inquisitive. And yet the auditing committee seem to have performed their duties very much as auditing committees do in other banks, with such full faith in the officers that no important examination is made. The only necessity for such an audit is

based on the known frailty of human nature; the possibility that trusted officers may have been false. The way to keep men honest is not to lead them into, but to guard them from, temptation. This case differs from the case of *Myer v. Caperton*, 87 Ky., and 8 S. W. Rep'r, above cited by the master, in this: that in the latter case the frauds of the cashier, running through nine years, were carefully concealed in false entries in various individual accounts, failure to charge the bank with deposits and other items. It would have required a thorough examination by an expert book-keeper to have discovered the fraud. In this case, for more than three years the individual ledger carried on its face, in daily red ink balances, the notice of overdrafts which required no expert to detect; but any man who could read, and who knew that overdrafts are usually so marked on bank-books, would, on a fifteen or five minutes' inspection, have discovered them.

*A. M. Brown, D. F. Patterson and H. A. Miller* for appellants. *D. T. Watson, J. M. Stoner, Geo. W. Guthrie, Isaac S. Van Voorhis, T. C. Lazear, S. Schoyer, Jr., and Knox & Reed* for appellees.

PAXSON, O. J. This case has been so carefully considered by the learned master and court below that little remains for us to add. Indeed, in a case of such magnitude, involving a vast mass of testimony, we can do little more than see that the principles upon which it has been decided below are sound. Briefly stated, the bill was filed for the purpose of holding the officers and directors of the bank responsible for the losses resulting from its failure. It is claimed that the officers and directors were negligent in their management of the bank's affairs, and that by reason of such negligence the losses occurred. It is conceded on all sides that the losses and the disastrous failure of the bank were directly traceable to Mr. Riddle, its late president, now deceased. He practically emptied the vaults of the bank in carrying on a gigantic speculation in oil. This was done with the knowledge of the cashier, and the co-operation of one or more clerks or subordinates. It would have been extremely difficult, if not practically impossible, for any person to have committed such a swindle without the co-operation of some one inside. The question is, whether the directors ought to have known of these transactions, and whether

their failure to know what the real plunderer was doing was such negligence on their part as to render them liable to the creditors of the bank. The Penn Bank closed its doors in May, 1884. It is not too much to say that its failure was a great shock to the business interests of Pittsburgh. It was the cause of much excitement; led to a large amount of litigation, much of it directed against the board of directors. As usual in such cases, the current of public opinion was turned against them, and up to the present time they have been defending themselves against hostile litigation. The time has now arrived when the rights of the parties can be considered calmly, and disposed of in disregard of prejudice or popular clamor.

The first question that naturally suggests itself for our consideration is the extent of the duty which the directors of a bank owe to the stockholders, whom they represent directly, and the creditors, whom they represent indirectly. Upon this point there is a general misapprehension in the popular mind. This finds expression after bank failures in severe condemnation of directors, and a general assertion of the doctrine that their duty requires them to be familiar with all the details of the management. In the popular mind they are held to the rule that they ought to take the same care of the affairs of the bank that they do of their own private business. Even the learned judge below evidently adopted this view when he said in his opinion: "If we were to decide this case on first impressions as to the conclusions of fact to be drawn, and under the decisions cited and rules laid down in the minority opinion in *Briggs v. Spaulding*, we would say there was gross negligence, or want of the ordinary care that a man of fair intelligence would take of his own affairs." It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatary. His principal business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods — generally once or twice a week — for an hour or two. The condition of the bank is then laid before him in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank in which he participates. The cash on hand is counted, the bills receivable and securities ex-

amined, to see whether they correspond with the statement as furnished by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials, who are paid for such services and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business, he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs.

A vast amount of authority has been cited upon this question which we do not think it necessary to review. It is sufficient to refer to a few cases only. In *Spering's Appeal*, 71 Penn. St. 11, the subject is very fully discussed by the late Justice Sharswood, and the rule of ordinary care is laid down. Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are every thing in considering this question. The ordinary care of a business man in his own affairs means one thing, and the ordinary care of a gratuitous mandatary is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give, in a short space of time, to the business of other persons from whom he receives no compensation. The same learned judge, in *Maisch v. Saving Fund*, 5 Phila. 30, laid down the rule as follows: "As to the directors, however, \* \* \* receiving no benefit or advantage, they can be considered only as gratuitous mandataries, liable only for fraud or such gross negligence as amounts to fraud." Again, in *Spering's Appeal*, *supra*, he said: "Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill."

We may also refer to *Briggs v. Spaulding*, 141 U. S. 132; 11 Sup. Ct. Rep'r, 924, which goes even further than our cases upon this point. It does not relieve a director from the consequence of gross negligence in the performance of his duty, but it holds that he is not responsible where he has used the ordinary care which bank directors usually exercise. It is true this was the case of a national bank, but we apprehend that what is negligence on the part of a director of a national bank would, as a general rule, be negligence by a director of a state bank, and subject to the same liability.

In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus, if the director of a bank performed his duties as such in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence; and care must be taken that we do not hold mere gratuitous mandataries to such a severe rule as to drive all honest men out of such positions. This thought is so well expressed by Sir George Jessel, M. R., in his opinion in *Re Dean Coal Min. Co.*, 10 Ch. Div. 450, that I give his remarks in full: "One must be very careful, in administering the law of joint-stock companies, not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a neglect to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle." Holding, then, the rule to be that directors, who are gratuitous mandataries, are only liable for fraud, or for such gross negligence as amounts to fraud, it remains but to apply this principle to the facts of this case. It is not alleged — it has never been alleged — that the hands of these directors are stained by fraud. The bank was wrecked by its president, with the cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the

means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The reports of the bank's condition made by the president to the directors from time to time showed it to be in good condition, while in point of fact it was honey-combed with fraud, and its assets squandered in wild speculations. It may be asked, why did not the directors discover this by an examination of the books? The answer is that if they had examined every book in the bank, with a single exception, they would not have found the fraud. That exception is the individual ledger. All the frauds were dumped into this book, and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburgh banks, the directors are not allowed to see. This is a rule of policy on the part of most city banks, and the reason for it is at least plausible. A director largely engaged in business may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts, it gives him an advantage, and an insight into a rival's affairs that few business men would tolerate. Hence it is a question with many banks whether to adopt this rule, or lose valuable customers, and they generally prefer the former. We are not speaking of the wisdom of the rule, only of its existence, as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book which, by the rules of their own bank, and of four-fifths of the other banks in Pittsburgh, the directors are not permitted to see?

Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high. They were the trusted agents of the corporation, paid for their services, and regarded in the community in which they lived as honest men. Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large proportion of it. And so thoroughly were they deceived by the president as to its condition that when the first stoppage occurred they not only believed the suspension was temporary, but they showed their faith by

their works, and upon their individual credit raised the sum of \$289,000 to enable it to resume. They did not desert the ship like a parcel of drowning rats, but imperiled their private fortunes in an effort to keep it afloat. Under such circumstances, it would be an act of gross injustice to hold them liable for the frauds of others, in which they had not participated — of which they had no knowledge — and which have only been brought to light with the aid of experts. We must measure this transaction by the light which these directors had at the time the transactions occurred. It would be unfair to judge them by the calcium light which has been turned on for six years, and which has enabled us to trace at last the sinuous path of Riddle and his confederates in crime, and the means by which this bank has been robbed and plundered. We are of opinion that the master and the court below were right in their conclusion, and the decree is affirmed upon the appeal of the assignee, and the appeal dismissed at his costs.\*

1. **Corporations — degree of care and diligence to be exercised by directors in the discharge of their duties.**—The foregoing case and that of *Briggs v. Spaulding*, 141 U. S. 183; 4 Am. R. R. & Corp. Rep. 712, are important decisions touching the duties and liabilities of directors of corporations. The decisions have been criticised as sanctioning too lax a rule in regard to the care to be exercised by directors, but they have been rendered by courts of the highest authority and respectability, and will undoubtedly exert a large influence in fixing the law upon the subject. In every case in which it is sought to hold directors liable for losses on account of their neglect or inattention to duty, two questions necessarily arise: *first*, a question of law, as to the degree of care which they ought to exercise under the circumstances, and, *second*, a question of fact, as to whether they have exercised the proper degree of care in the particular case. The first question is the only one which is open to general discussion. The second is necessarily peculiar to each case.

Various rules have been laid down as to the degree of care which directors ought to exercise in the discharge of their duties. It is generally held that directors are bound to the exercise of ordinary care and prudence in this respect, and that they will be liable for any losses sustained by the corporation in consequence of their failure to exercise such care and prudence. *Smith v. Prattville Mfg. Co.*, 20 Ala. 503, 509; *Neale v. Hill*, 16 Cal. 145; *Delano v. Case*, 121 Ill. 247; S. C., 17 Ill. App. 531; *United Society of Shakers v. Underwood*, 9 Bush. 609; *Brannin v. Loving*, 82 Ky. 370; *Percy v. Millandon*, 8 Mart. N. S. 68; S. C., 3 La. 568; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196; *Hun v. Cary*, 82 N. Y. 65; *Robinson v. Smith*, 3 Paige, 223; *Spering's Appeal*, 71 Penn. St. 11; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 680; 15 S. W. Rep'r,

\* Reported in 23 Atl. Rep'r, 406.

448; *Bank v. Bossieux*, 4 *Hughes*, 387. Ordinary care is usually defined as such care as men of ordinary prudence usually exercise in their own affairs. *Horn Silver Mining Co. v. Ryan*, 42 *Minn.* 196; *Williams v. Halliard*, 38 *N. J. Eq.* 373; *Scott v. DePeyster*, 1 *Edw. Ch.* 513; *Hun v. Cary*, 82 *N. Y.* 65; *Wallace v. Lincoln Sav. Bank*, 89 *Tenn.* 630. Sometimes it is said that directors will only be liable for gross neglect or inattention to duty. *Smith v. Prattville Mfg. Co.*, 29 *Ala.* 503, 509; *Neale v. Hill*, 16 *Cal.* 145; *Robinson v. Smith*, 3 *Paige*, 222; *Brannin v. Loving*, 82 *Ky.* 370; *Bank v. Bossieux*, 4 *Hughes*, 387; *Brinkerhoff v. Bostwick*, 83 *N. Y.* 52; *S. C.*, 99 *N. Y.* 185; 105 *N. Y.* 567. But by gross negligence is usually meant the same thing as a failure to exercise ordinary care, so that all these expressions come to the same thing. *Savings Bank v. Carpenter*, 87 *Ky.* 306; *Hun v. Cary*, 82 *N. Y.* 65, 72.

A more particular statement of the views expressed by the different courts may be of advantage. In a suit to hold directors of a bank liable for compensation unlawfully voted to a director for extra services performed by him, in which it was held that they were not liable, having acted in good faith and under an honest mistake as to the law, the court says: "The power conferred upon the directory was a trust of the greatest delicacy, and of the highest importance, in the exercise of which the utmost good faith on their part was necessary. The undertaking implies a competent knowledge of the duties of the agency assumed by them, as well as a pledge that they will diligently supervise, watch over and protect the interests of the institution committed to their care." *Godbold v. Branch Bank*, 11 *Ala.* 191.

In *Shea v. Mabry*, 1 *Lea*, 319, in which certain directors of a railroad company were held liable for certain moneys which they had permitted to be used in lobbying, the court says: "Directors are not mere figure-heads of a corporation. They are trustees for the company, for the stockholders, for the creditors, and for the state. They must not only use good faith, but also care, attention and circumspection in the affairs of the corporation, and particularly in the safe-keeping and disbursement of funds committed to their custody and control. They must see that these funds are appropriated as intended to the purpose of the trust, and if they misappropriate them or allow others to divert them from their purpose, they must answer for it to their *cestui que trust*."

In *Hun v. Cary*, 82 *N. Y.* 65, it appears that the directors of a savings bank which had an average deposit of only \$70,000 and whose expenses had exceeded its income, expended nearly \$60,000 in a lot and building for the use of the bank. Subsequently real estate declined and the bank soon after failed. The directors were held liable to the receiver of the bank for damages sustained by it in consequence of the investment, on the ground that "it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires." As to the care to be exercised by such trustees the court speaks as follows:

"The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend



such limits and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith, within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty — *crassa negligentia* — not to bestow them."

In *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630; 15 S. W. Rep'r, 448, it is said: "Directors, by assuming office, agree to give as much of their time and attention to the duties assumed as the proper care of the interest intrusted to them may require. If they are inattentive to their duties, if they neglect to attend meetings of their board, if they turn over the management of the business of their company to the exclusive control of other agents, thus abdicating their control, then they are guilty of gross neglect with respect to their ministerial duties, and, if loss results to the corporation by breach of trust or acts of negligence committed by those left in control, which by due care and attention on their part could have been avoided, they will be responsible to the corporation. The diligence required of them has been defined as that exercised by prudent men about their own affairs, being that degree of diligence characterized as 'ordinary.' If a less degree of diligence is exercised, the negligence is gross, and for losses consequent he is liable."

In a case decided by Lord Chancellor Hardwicke in 1742, wherein it was sought to charge the directors of a corporation with losses alleged to have resulted from their neglect and inattention to their duties, he says: "I take the employment of a director to be of a mixed nature, it partakes of the nature of a public office, as it arises from the charter of the crown.

"But it cannot be said to be an employment affecting the public government; and for this reason none of the directors of the great companies, the Bank, South Sea, etc., are required to qualify themselves by taking the sacrament.

"Therefore, committee-men are most properly agents to those who employ

them in this trust, and who empower them to direct and superintend the affairs of the corporation.

"In this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance. Vide Domat's Civil Law upon this head, 2 B. Tit. 8, §§ 1 and 2.

"Now where acts are executed within their authority, as repealing by-laws and making orders, in such cases, though attended with bad consequences, it will be very difficult to determine that these are breaches of trust.

"For it is by no means just in a judge, after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen, and, therefore, were guilty of a breach of trust.

"Next as to malfeasance and non-feasance. To instance, in non-attendance, if some persons are guilty of gross non-attendance, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others.

"By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they have had no benefit from it, but that it was merely honorary, and, therefore, they are within the case of common trustees. Vide *Coggs v. Bernard*, 1 Salk. 26.

"Another objection has been made, that the court can make no decree upon these persons which will be just, for it is said every man's non-attendance or omission of his duty is his own default, and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of this court.

"Now, if this doctrine should prevail, it is indeed laying the axe to the root of the tree.

"But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross, complicated loss happens, I will never determine that they are not all guilty.

"Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity." (*Charitable Corporation v. Sutton*, 3 Atkyns, 400.

From the three most recent text-books on corporations, we get the following: Beach says that directors "must exercise such reasonable diligence or ordinary care as a prudent man takes in the management of his own concerns. They are personally liable if they suffer the corporate funds or property to be wasted or lost by gross negligence and inattention to the duties of their trust." *Beach Priv. Corp.*, § 249. Spelling says: "The measure of care and diligence required of directors is generally held to be such as a prudent man exercises in his own affairs. What constitutes a proper performance of the duties of a director is a question of fact which must be determined in each case in view of all the circumstances. The character of the company, the condition and extent of its business, the usual method of managing such companies, and all other relevant facts must be taken into consideration. No abstract reasoning can be of service in reaching a proper solution." 1 *Spelling Priv. Corp.*, § 432. This is much the same view taken by Mr. Morawetz who says: "Attempts have been made to define the degree of care and prudence which directors must exercise in the performance of their duties. In some of the cases it has been said, that, inasmuch as directors are usually not paid for their ser-

vices, they are to be regarded as *mandataries* — persons who have gratuitously undertaken to perform certain duties, and are bound to exercise only ordinary care and prudence — and that they are liable to the corporation only for what is called *crassa negligentia*, or gross negligence. But all this is, at the best, misleading. The plain and obvious rule is, that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution." 1 Morawetz Priv. Corp., § 552.

The "plain and obvious rule," stated by Mr. Morawetz, is the ultimate proposition to be decided in each case. This is severable into two questions, one of law, and one of fact. In considering whether directors in any particular case have exercised as much diligence and care as a "proper performance" of their duties "requires," every person must necessarily have in mind, either consciously or unconsciously, some *criterion* or *rule*, by which the diligence and care exercised, is to be measured or compared. It is this criterion or rule which we seek and which can and ought to be accurately formulated.

The rule that directors should exercise such care and diligence in the discharge of their duties as prudent men exercise in their own affairs, must be taken with some qualification or explanation. If, for instance, five men constitute the directory of a bank, it cannot be that they are to give its affairs the same degree of care and attention that they would give them if the bank was their own, and they carried it on as co-partners. The remarks of the principal case upon this point are quite just.

It seems to us that the rule to be deduced from the authorities is, that directors are bound to exercise such care and diligence in the discharge of their duties as ordinarily prudent men exercise in similar positions under similar circumstances. Stockholders in a corporation may reasonably be presumed to know the manner in which the affairs of like corporations are usually managed. They have no right to expect that the directors whom they choose will be more vigilant than directors usually are, or that they will depart from the methods of administration usually pursued by directors in similar corporations. In *Briggs v. Spaulding* the supreme court of the United States sums up the matter as follows: "In any view the degree of care to which these defendants were bound is that which *ordinarily prudent and diligent men would exercise under similar circumstances*, and in determining that the restrictions of the statutes and the *usages of business* should be taken into account." *Briggs v. Spaulding*, 4 Am. R. R. & Corp. Rep. 729. In the principal case, after having determined that directors are only bound to the exercise of ordinary care and consequently are only liable for a failure to exercise such care, or for gross negligence, it is said: "In regard to what is ordinary care, regard may be had to the *usages of the particular business*. Thus, if the director of a bank performed his duties as such *in the same manner as they were performed by all other directors of all other banks in the same city*, it could not fairly be said that he was guilty of gross negligence."

In *Dunn's Admr. v. Kyle's Ex'r*, 14 Bush. 134, which is a case similar to *Briggs v. Spaulding* and the principal case, it is held sufficient if the directors exercise "that character of vigilance that is *usual and customary with bank directors*." P. 141. So in *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630; 15 S. W. Rep'r, 448, the court says: "The standard of diligence and prudence by which bank officers and bank directors should be tried is that which business men have erected for themselves. *Reasonable conformity to the customs and methods in vogue among prudent bankers is the degree of diligence required of such officers*." In *Savings Bank v. Caperton*, 87 Ky. 306, which is a case similar to the foregoing cases, the court say the question is whether the defendants exercised "*such diligence as ordinarily prudent men would have exercised with reference to the conducting of such a moneyed institution*." And again: "It is not a question as to how the frauds of the cashier might have been discovered, but were these directors guilty of gross negligence, *which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised*."

Although the cases we have cited refer to banking corporations, there is no reason why the rule should not be general, in the form we have given it above. We think this rule is what was intended by the numerous authorities, some of which are cited in the early part of this section, by the general language that directors are bound to exercise ordinary care and prudence in the discharge of their duties; that is, such care and prudence as ordinarily prudent men exercise under similar circumstances.

It follows from the rule that in any action to hold the directors of a corporation liable for neglect, it is competent to show the manner in which directors of similar corporations in the same city or locality are accustomed to discharge their duties. Such evidence was received in the following cases: *Briggs v. Spaulding*, 4 Am. R. R. & Corp. Rep. 712; *Savings Bank v. Caperton*, 87 Ky. 306; *Scott v. Depeyster*, 1 Edw. Ch. 513; also the principal case.

The general conclusions of the principal case are supported by the following authorities, all of which are more or less similar in their facts: *Briggs v. Spaulding*, 141 U. S. 132; 4 Am. R. R. & Corp. Rep. 712; *Dunn's Admr. v. Kyle's Ex'r*, 14 Bush. 134; *Branning v. Loving*, 82 Ky. 370; *Savings Bank v. Caperton*, 87 Ky. 306; *Speering's Appeal*, 71 Penn. St. 11; *Scott v. Depeyster*, 1 Edw. Ch. 513; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; 15 S. W. Rep'r, 448; *Vance v. Phoenix Ins. Co.*, 4 Lea, 385.

The cases in 14 Bush. 134 and 87 Ky. 306. were for the purpose of holding directors of a bank liable for defalcations of the cashier. In so far as the earlier case of *United Society of Shakers v. Underwood*, 9 Bush. 609, announces any different doctrine, it must be considered as overruled by the later decisions. In *Savings Bank v. Caperton*, 87 Ky. 306, it appeared that the bank in question had been rendered insolvent by the embezzlement of the cashier, carried on through a period of nine years and concealed by false entries in the books. The same person was at once cashier, book-keeper and teller. The suit was to charge the directors with loss, because of their negligence in not discovering and preventing the wrongs of the cashier. The grounds upon which the defendants were held not liable and the general manner in which they discharged their duties as directors, which was held a sufficient exercise of care and diligence on their part, are thus stated by the court:

"The principal grounds relied on for a reversal in this case are: First, that the directors, in giving to Rhorer the sole control of the books of the bank, making him cashier, book-keeper and teller, placed it within his power to perpetrate the fraud, and for that reason they were guilty of such neglect as makes them responsible to the bank. Second, they failed to make proper examinations as to the condition of the bank, and allowed the books to be falsely kept. We have said that it was their duty to exercise that reasonable and ordinary care with reference to the affairs of the bank that ordinarily prudent men would exercise in reference to such business affairs. If it was the duty of the directors to examine the books of the bank in the absence of any reason for suspecting the honesty of the bank's cashier, with a view of testing their correctness with the weekly statements made them, or when making their periodical investigation of the money on hand, and the notes, bills and bonds belonging to the bank — it being manifest that the frauds could have been easily discovered, at least by a book-keeper of ordinary intelligence — their responsibility would necessarily follow. It is difficult to define each and every duty pertaining to such a position, but we are satisfied that a bank director is neither required to be an expert, or a competent book-keeper, or do more in the general management of the bank, with reference to its cashier and book-keeper, than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily or monthly statements made to the board correspond with the general balances upon the books. In this case the weekly statements as to the cash on hand, bills discounted, etc., corresponded with the cash account as it appeared each day or at the time the statement was made, with the cash account on the teller's blotter, where, as in this case, the cash account was kept. It is argued, however, and the expert so states, that these frauds could have been readily detected by comparing a balance on the individual ledger with the amount stated to be due depositors in Rhorer's weekly statements. It is plain that any director, if at all conversant with book-keeping, could have gone to the individual ledger, and running over the accounts of depositors, and then comparing that with the blotter ending each day's transactions could have discovered the fraud, or it might have been discovered by ascertaining the amount due each depositor, as appeared from that book; but we know of no rule of law or reason that would require such an investigation by directors, and to hold them responsible for failing to discharge such a duty would be imposing a responsibility that no business man would assume, without a compensation commensurate with the labor required.

"If they have selected a cashier and book-keeper, regarded at the time as qualified for the position assigned, or used reasonable care and precaution in making the selection, and taken from him a bond in an adequate penalty for the faithful discharge of his duties, his weekly or daily statements, as the custom of banks may be, agreeing with the balances as found on his books, connected with the periodical count of the money, notes, bonds, etc., is all the the supervision required, unless the directors have some cause for suspecting, or see that he is neglecting his duties.

"In the present case the cashier made weekly statements to the directors that were compared with the cash balances and found correct, or if not compared at the time, those statements agreed with the general balance found on the books, that were, however, false and erroneous by reason of fraudulent

entries and forced balances. They examined the general condition of the bank once in every six months, by making an actual count of the cash, and ascertaining the amount of bills, notes, bonds and securities on hand, all of which agreed with the statements made by the cashier and verified by the general balance found on the books."

In *Scott v. Depeyster*, 1 Edw. Ch. 513, 541, 542, the court says: "I know of no law which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity and it be suffered to pass unheeded, a different rule would prevail if a loss ensued. But, without some fault on the part of the directors, amounting to either negligence or fraud, they cannot be liable."

The officers, agents and employes of a corporation, though selected and appointed by the directors, are not their agents. If they have exercised reasonable care, prudence and judgment in their selection, they have discharged their whole duty to the corporation in that behalf, and they are not liable for their subsequent defaults, unless such defaults are made possible by the failure of the directors to exercise ordinary care in the management of the affairs of the corporation. *Batchelor v. Planters' Nat. Bank*, 78 Ky. 435; *Savings Bank v. Caperton*, 87 Ky. 306; *Scott v. Depeyster*, 1 Edw. Ch. 513; *Stone v. Cartwright*, 6 T. R. 411; *Cargill v. Bower*, L. R., 10 Ch. Div. 502; *Briggs v. Spaulding*, 4 Am. R. R. & Corp. Rep. 712.

Some cases in which directors have been held liable on the ground of mere negligence or inattention to duty, remain to be noticed. In *United Society of Shakers v. Underwood*, 9 Bush, 609, the action was for the loss of a special deposit made with a bank by the plaintiff. The officers of the bank had wrongfully converted this deposit from time to time, and the books of the bank showed it. A decision sustaining a demurrer to the petition was reversed. The court holds that there was sufficient privity to support the action, and that the defendants were negligent in not knowing what the books and papers of the bank showed, and, therefore, negligent in not preventing the loss.

In *Bank of Mutual Redemption v. Hill*, 56 Me. 385, the directors were held liable for negligence in making loans to persons utterly irresponsible, such as laborers, clerks and persons bankrupt in property.

In *Bank v. Bossieux*, 4 Hughes, 387, the directors of a bank were held to have been guilty of gross negligence and inattention to duty, in leaving the whole control and management to the officers and agents of the bank and only meeting once in six months.

In *Maisch v. Saving Fund*, 5 Phila. 30, a bill was held good on demurrer, which sought to hold the directors of a bank liable for the frauds and misfeasances of the officers, it being alleged and shown that if they had used the ordinary means of supervision and examination, the frauds would have been discovered.

In *Horn Silver Mining Co. v. Ryan*, 42 Minn. 196, the defendant was one of seven directors of the company. The complaint sought to charge him with

liability for a large loss sustained by the company through the acts of the president and vice-president (two of the directors), in loaning the funds of the corporation to themselves, which they were wholly unable to repay.

The complaint was held good on demurrer, but the report gives but a meager account of the allegations of negligence to be found in the complaint. In the opinion of the court it is said: "After stating the facts in reference to the misappropriation and use of the funds of the corporation by two of the directors, who are officers, and specially intrusted with the management of the same, with full knowledge of the defendant, the complaint shows, in substance, among other things, that the defendant, who was a director for a series of years, charged with the duties usually pertaining to that office, and with the duty of exercising care and oversight over the officers of the company, wholly neglected his official duty in respect to the transactions of the defaulting officers, and the protection of the funds of the company; that the means of knowledge were within his reach; that he ought to have known the truth in respect to the fraud and misconduct charged, and to have taken steps to prevent and expose the same, which he wholly failed to do, but abstained from attending the meetings, and neglected to perform his duties to the corporation and its stockholders in the protection of the rights and property of the corporation; and that by reason of his non-feasance and neglect the plaintiff has been damaged as claimed. It is manifest, we think, that if an action could be sustained at all upon a charge of negligence against a director, under such circumstances, the complaint must be held sufficient."

From the statement of the case it appears that an account of the moneys so unlawfully withdrawn was kept on the company's books, and the complaint alleged that the defendant had access to the books and that he had knowledge and means of knowledge of the misappropriation, and charged upon information and belief that the defendant knew of the misappropriation.

It is difficult to tell from this statement of the complaint whether the defendant actually had knowledge of the wrongs complained of or whether he had the means of knowledge and ought to have known them. If the former, the case is clear; if the latter, the case is more doubtful.

The last case to be noticed is that of *Delano v. Case*, 121 Ill. 247; 17 Ill. App. 531. This was a suit by a depositor against the directors of a bank, to recover from them the amount of his deposit, on the ground that the assets of the bank had been stolen by the cashier and his assistant, and that such thefts were made possible by the negligence of the defendants in the discharge of their duties. The plaintiff recovered a judgment, which was affirmed by the appellate court (17 Ill. App. 531), and the judgment of the latter court was affirmed by the supreme court. The latter court in affirming the case say: "The appellate court, in its opinion filed on rendering that judgment, holds, first, that the directors of a bank are trustees for depositors as well as for stockholders; second, that they are bound to the observance of ordinary care and diligence, and are hence liable for injuries resulting from their nonobservance; and, third, that the present appellants did not observe that degree of care and diligence, and in consequence thereof, appellee sustained the damages for which the judgment was rendered. The last proposition we are relieved from inquiring into, since there was evidence tending (though, it may be, but slightly) to

sustain it. The propositions of law, as above stated, are, in our opinion, free of objection and sustained by authority." *Delano v. Case*, 121 Ill. 247.

The evidence, which the appellate court held sufficient to sustain the proposition that the defendants had failed to exercise ordinary care and diligence, and which the supreme court held to tend, though but slightly, in that direction, was as follows: Testimony as to the false entries and discrepancies appearing upon the books whereby the guilty parties had endeavored to conceal their wrongs. Thus, while at one date the general ledger showed the amount due depositors to be \$11,850.73, the individual ledger showed the true amount to be \$36,779.27. At another time the respective amounts were \$10,868.65 and \$49,616.50. The manner in which the directors discharged their duties was shown by the testimony of the president, which is stated as follows: "The bank closed because it had been robbed by the cashier and assistant and was insolvent. Don't know how long before the failure of the bank it was robbed. When it closed the money was all gone except about \$8,000. Cannot tell how much money there ought to have been in the bank. While he was president the affairs of the bank were managed by the directors. The directors met once a year to elect officers and declare dividends. About once a month the finance committee counted the money, and returned to Mr. Beach, the cashier. What he did with it he had no idea. The finance committee, in 1877, were Directors Cross, Bahr and himself. Cannot say that the finance committee at any time made any great investigation. It met once a month as a general thing. Would look over the accounts, count the money and hand it back to the cashier. Did not examine and verify the books, and compare their statements with the assets, etc., which the books called for, and no such examinations were made by any of the directors to his knowledge. Beach was cashier of the bank from the time of its organization. Crompton was first a clerk, and then assistant cashier many years. Some ten months before the failure of the bank witness suspected that Crompton was stealing from the bank. Witness thought that he was spending too much money, buying property, living extravagantly in Bunker Hill, and traveling. After he conceived the suspicion in regard to Crompton, he and Cross went around and notified the directors of his belief that Crompton was stealing from the bank. They refused to believe it. Saw all the directors except Bauman. They would not believe any thing was wrong. Nothing more was done, but witness went to the bank and told Beach and Crompton what his suspicions were. This was about ten months before the failure. Supposes that the reason that the directors would not believe him was that they thought Beach and Crompton honest men. They were such good praying men. He thought after he talked to them that they were honest, and no more examination was made afterward than was usual before. The assets of the bank consisted of notes, accounts, real estate and money. He made no examination after the failure."

It thus appears that there had been that in the conduct of the cashier to arouse suspicion of his honesty, and that all the directors but one had been notified of that suspicion and its grounds, and yet that they either refused to believe there was any foundation for it or rested satisfied with the explanations of the cashier.

Of these cases in which directors have been held liable for negligence and in-



attention, the one in 9 Bush, 609, has been modified by later decisions of the same court. Those in 42 Minn. 196, and 5 Phila. 30, were not upon the merits but upon demurrer, and obscure at that. In the case in 56 Me. 385, the defendants were held liable for positive acts performed with a negligent and even reckless disregard of duty. The Illinois case may fairly be considered as showing gross negligence on the part of the defendants. It is doubtful if any of the cases can be held to support any more stringent rule of liability than that which we have formulated above, viz., that directors are bound to exercise that degree of care and diligence in the discharge of their duties, that ordinarily prudent men exercise in similar positions under similar circumstances.

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PEOPLE V. BUFFALO STONE AND CEMENT CO.

(Court of Appeals of New York, Feb. 9, 1892.)

1. CORPORATIONS. FORFEITURE OF CHARTER. FAILURE TO MAKE ANNUAL REPORT. The failure of a manufacturing corporation to make an annual report as required by the manufacturing act of 1848, section 12, is cause for dissolving the corporation, under Code, section 1798, which declares that a corporation may be annulled whenever it offends against any provision of an act under which it was created.

2. The fact that said section 12 imposes a penalty upon the trustees for a failure to make the report required does not exempt the corporation from the consequences of such failure on the principle that where one penalty is declared no other can be implied, since the penalty imposed is upon the trustees and not upon the corporation.

3. FAILURE TO PAY IN CAPITAL STOCK WITHIN TIME PRESCRIBED. General manufacturing act, section 10, provides that the capital stock of corporations formed thereunder "shall be paid in, one-half in one year and the other half in two years from the incorporation, or the corporation shall be dissolved." Held, that where, in an action brought by the attorney-general by leave of court to dissolve a corporation, it is proved that the corporation has violated said act, the court has no discretion to refuse a judgment of dissolution.

4. SUIT AT INSTANCE OF OFFICERS IN DEFAULT. Where an action to dissolve a corporation is brought by the attorney-general in the name of the people, without a relator, the fact that the persons who applied to him to bring the action were the very officers whose neglect to perform their official duties constitutes the cause for dissolution is no bar to the action.

**A** PPEAL from superior court of Buffalo, general term. Action to forfeit the franchises and annul the charter of the Buffalo Stone and Cement Company. Plaintiff obtained judgment, which was affirmed by the general term. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by Earl, C. J. :

The defendant was organized as a corporation on the 18th day of August, 1885, under the general manufacturing act of 1848. Its capital stock was \$90,000, divided into nine hundred shares of \$100 each. Prior to its incorporation the persons who proposed to take its stock entered into a written agreement that each subscriber for stock should pay fifteen per cent of the amount of his stock at the time of his subscription, and that the balance should be paid on calls to be made, not exceeding ten per cent at a time within ten years. During the first two years of the defendant's corporate existence only seventy-seven and one-half per cent of the capital stock was paid in, and no more has been paid in since, and the annual report required by section 12 of the act for January, 1889, was not made. On the 2d of March, 1889, a petition, signed by various stockholders of the defendant, was presented to the attorney-general, asking him to commence an action against the defendant to have its franchises forfeited and its charter annulled. Thereafter the attorney-general made an application to a special term of the supreme court for leave to commence an action to annul the charter, and an order was made by the court on the 23d day of April, 1889, granting such leave, and this action was commenced on the following day. The action was brought to trial, and resulted in a judgment in favor of the plaintiff, dissolving the defendant, and forfeiting its rights, privileges and franchises, and appointing a receiver of its property and effects. From that judgment the defendant appealed to the general term, and from affirmance there to this court.

*Charles Daniels* for appellant. *Henry W. Brendell* for the People.

EARL, C. J. (after stating the facts). Section 1798 of the Code provides that upon leave being granted as prescribed in the preceding section, the attorney-general may bring an action against a corporation created by or under the laws of the state to procure a judgment vacating its charter or annulling its existence, upon the grounds that it has "(1) offended against any provision of an act, by or under which it was created, altered or renewed, or an

act amending the same, and applicable to the corporation ; or (2) violated any provision of law whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers." In such a case the attorney-general may, upon his own information, or upon an application made to him by any citizen, move the court for leave to bring the action. He must determine, in the first instance, whether the public interests require that the action should be brought, and thus that it is his duty to bring it ; and then he must make application to the court for leave to bring it, and the court may exercise its discretion whether or not it will grant the leave. We have several times held that its discretion in such a case is not reviewable in this court. Such an action may be brought by the attorney-general in the name of the people without a relator, and it is then strictly a people's action. It is provided in section 1808 that " in a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director or trustee of the corporation applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action, or apply for leave to bring it, if he has good reason to believe that it can be maintained. Where such an application is made, section 1986 of this act applies thereto."

Section 1986 provides as follows: " Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person. In such a case the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people against the costs and expenses thereof. Where security is so given, the attorney-general is entitled to compensation for his services, to be paid by the relator in like manner as the attorney and counsel for a private person." That provision applies only to cases where the action is instituted in the name of the people to protect or secure the interests of individuals, like the actions specified in section 1781 of article 2, and sections 1784 and 1785 of article 3, of the Code, and in all cases where mere private interests are sought to be promoted by the commencement of the action by the attorney-general in the

name of the people. But an action to annul a corporation, under article 4, is purely a people's action, and proceeds upon public grounds; and it cannot be said, within the meaning of section 1986, that any person who instigates such an action, or applies to the attorney-general to have it commenced, has any interest in the questions involved in the action. The simple question to be determined in such an action is whether the existence of the corporation shall be permitted to continue, and it in no way concerns the rights and interests of the persons interested in the corporation, as between each other. It is simply a question between the corporation and the people, and to determine that question no individual need be present as a party to the action. Therefore, it is of no legal consequence that some of the persons who applied to the attorney-general to commence this action were the very trustees who omitted to make the annual report, as required by section 12 of the manufacturing act, or the very stockholders who omitted to pay for their stock. Their acts in no way prejudice the rights of the people. If a cause of forfeiture against the corporation exists, there is nothing in the conduct of any of the stockholders or officers of the corporation which can defeat the right of the people to enforce the forfeiture.

It is provided in section 12 of the manufacturing act of 1848 that every company formed under that act shall, within twenty days from the 1st day of January of each year, make the report as required by that section, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts; which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of the company, and filed in the office of the clerk of the county where the business of the company shall be carried on. The provision is that "every such company" shall make the report, and the duty to make it is a corporate duty imposed upon the company. *Cornell v. Roach*, 101 N. Y. 373. This duty was not performed, and it is claimed on behalf of the people that, for the neglect, omission or refusal to perform it, there was cause for annulling its charter, under the provision of the Code above set out. The duty is not simply one in which particular persons are alone interested, but it is a

duty which the corporation owes to the public generally for the protection of all persons who may have occasion to deal with it, and to subserve a plainly expressed public policy; and for the omission to perform the duty it incurs the liability of forfeiture of its charter. Corporations are formed for definite objects, and their powers and duties are prescribed by law. The state confers upon them valuable franchises, and to carry out its policy exacts the performance of specified duties. They must exercise their franchises and perform the duties and obey the commands of the law as conditions of their existence. If they fail to travel in the orbits designated by the laws of their existence, the state may take away the corporate life which it has created. Such was the rule of the common law, and such has for a long time been the statute law of this state. In *People v. Turnpike Co.*, 23 Wend. 193, it was held that non-compliance with the requirements of an act of incorporation of a turnpike company as to the construction of the road is *per se* misuser, forfeiting the privileges and franchises conferred; that the duties enjoined by an act of incorporation are conditions attached to the grant of the franchises conferred, and that it is not necessary to work a forfeiture that the neglect or refusal to perform the duties enjoined should proceed from a bad or corrupt motive; that it is enough that the duties be neglected or designedly omitted. Nelson, C. J., writing the opinion of the court, and construing provisions of the Revised Statutes substantially like those of the Code which we are now called upon to construe, said: "The statutes obviously intended that corporations should fulfill the conditions and perform the duties enjoined by the fundamental law of their creation, as the terms upon which to enjoy their privileges. The principle is not new. It has been always so held at common law as fundamental. Lord Holt said in *London City v. Vanacker*, 1 Ld. Raym. 498: 'All franchises which are granted are upon condition that they shall be duly executed, according to the charter that settles their constitution; and, that being a condition annexed to the grant, the citizens cannot make an alteration; but, if they neglect to perform the terms of the patent, it may be repealed by *scire facias*.' The principle is so thoroughly and firmly fixed in the law of corporate bodies that I need do no more than refer to some of the authorities. A non-performance, therefore, of the condi-

tions of the act of incorporation, is deemed *per se* a misuser that will forfeit the grant, even at common law."

In *Attorney-General v. Railroad Co.*, 6 Ired. 456, it was held by the supreme court of North Carolina that the failure of a railroad company to comply with a provision of its charter requiring the president and directors of the company to make an annual statement of its income, and return the same to the general assembly, in order to enable the latter to regulate the tolls charged by the company, was a cause for declaring the charter forfeited. Chief Justice Ruffin, delivering the opinion of the court, said: "We entertain no doubt that the omission of an express duty prescribed by a charter to a corporation is cause of forfeiture. Its performance is in the nature of a condition, and the sovereign may insist on resuming his grant for the breach of the condition. \* \* \* When the charter expressly imposes a duty which the company is to perform, not merely to the citizen, but toward the sovereign itself, although it may not declare that non-performance shall make a forfeiture, yet by no latitude of equitable interpretation can it be regarded as a hard bargain, and, as such, relieved against in a court of law; but it must be taken to have been required by the state as a material stipulation, for the non-performance of which by the corporation the state may put an end to the contract."

But it is further provided in section 12 that, if the corporation shall fail to make the report, "all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made;" and it is contended by the learned counsel for the appellant that that is the only consequence which is to follow from a failure to make the report; and he invokes the general rule of law that "when a duty is prescribed, and the consequence of a failure to perform it has been declared, it is in its nature an implied prohibition of all other punishments." Under the rule referred to, it must be held that the statute provides the only consequence to the trustees, and the only liability or penalty that can be imposed upon them. But section 12 imposed no liability or penalty upon the corporation for a failure to make the report. Such a failure of duty on the part of a corporation, in the performance of which the public are interested, is left to be

dealt with by the general provisions of law applicable to corporations, and its liability to forfeit its charter is the only consequence to it; and thus for the failure to make the report the corporation may suffer for an omission to perform a corporate duty, and the trustees may suffer for an omission to perform an official duty resting upon them.

But there is still another ground for upholding this judgment which is liable to less criticism. It is provided in section 10 of the general manufacturing act that the capital stock of every corporation formed under the act, as fixed and limited in its articles of incorporation, "shall be paid in, one-half thereof in one year, and the other half thereof in two years, from the incorporation of such company, or the corporation shall be dissolved." Here was an express duty imposed upon this corporation to see to it that all its stock was paid in within the time specified, and that was made an imperative duty, as it is provided that it shall be paid in, and, if that condition is not performed, the corporation shall be dissolved. We do not see how it is possible to so construe this language as to relieve a corporation from forfeiture of its charter for a non-compliance with the condition. Where it is claimed that this provision of the statute has been violated, the attorney-general may exercise his discretion, based upon all the facts in the case, whether the public interests require that he should commence an action, and, when he applies to the court for leave to commence it, it may exercise its discretion in the same way. But if he and it determine that it ought to be commenced, and it has been commenced, and it is proved that the stock has not all been paid in within the two years, then the statute is imperative that the corporation shall be dissolved; and no discretion, at that stage of the case, seems to be left to the court. But here, if the court had any discretion, it has exercised it by giving judgment for dissolution. As we have before stated, that some or all the persons who applied to the attorney-general to commence the action for a dissolution were among those who omitted to pay for their stock can have no legal effect whatever upon this action. It is sufficient for its maintenance that the corporation has omitted to enforce the payment of its stock within the time prescribed by law. Our conclusion, therefore, is that the judgment should be affirmed, with costs. All concur; Andrews,

Finch, Gray, and O'Brien, JJ., on the second ground stated in the opinion.\*

1. **Corporations — forfeiture of charter — unauthorized change of name.**— An attempt by a corporation to change its corporate name in a manner not authorized by law does not avoid its charter. *O'Donnell v. C. R. Johns & Co.*, 76 Tex. 362; 13 S. W. Rep'r, 876.

2. **Grounds of forfeiture — perversion of funds of temperance organization.**— The forfeiture of the charter of a corporation cannot be maintained on an averment in the information in the nature of a *quo warranto* that the corporation was formed to "promote the cause of temperance," and that it has abused its trust and misappropriated its funds, as it cannot be said that the perversion of the fund from so vague an object as "temperance" is a public injury. *People, ex rel., v. Dashaway Assn.*, 84 Cal. 114; 24 Pac. Rep'r, 277.

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### COMMONWEALTH V. CUTTER.

(Supreme Judicial Court of Massachusetts, Feb. 25, 1892.)

1. **MUNICIPAL CORPORATIONS. POLICE POWER. COMPELLING ABUTTING OWNERS TO REMOVE FILTH FROM PRIVATE WAY.** Under the general authority to promote the health and good order of the community a city may lawfully ordain that "no owner or occupant of land abutting on a private way, and having the right to use such way, shall suffer any filth," etc., "to remain on that part of the way adjoining such land."

2. The fact that, in order to keep the way free from refuse matter, the owner or occupant might be obliged to remove matter he had no agency in depositing there, does not render the ordinance unreasonable, or impose duties which cannot lawfully be enforced.

3. **DEFENSES.** It was no defense to a prosecution under such ordinance that another ordinance forbids any one removing filth or refuse matter through the streets without a permit from the board of health, as Revised Ordinances of 1890, chapter 19, make it the duty of the sanitary police to remove "all noxious refuse from yards and areas when so placed as to be easily removed."

4. **INDEFINITENESS OF ORDINANCE.** The ordinance is not indefinite because it attaches a penalty, if one "shall suffer any filth \* \* \* to remain" in the way, rather than provide a time beyond which it should not be allowed to remain.

5. **PLEADING.** In such prosecution it was not necessary to set out in the complaint the nature of defendant's right to the use of the way.

**EXCEPTIONS** from superior court, Suffolk county, Daniel W. Bond, judge. Leonard R. Cutter was convicted of violating the Revised Ordinances of Boston, chapter 25, section 49, which

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\* Reported in 29 N. E. Rep'r, 947; 131 N. Y. 140.



provide: "No owner or occupant of land abutting on a private passage-way, and having the right to use such passage-way, shall suffer any filth, or waste or stagnant water, to remain on that part of the passage-way adjoining such land." Defendant took exceptions. Overruled.

*G. C. Travis*, assistant attorney-general, for the commonwealth. *G. D. Bigelow* for defendant.

**MORTON, J.** It is plain that the general object of the ordinance is to promote the health of the inhabitants of Boston. By Public Statutes, chapter 27, section 15, towns may make by-laws for preserving peace and good order within their limits; and by Statutes 1854, chapter 448, section 35, the city council of Boston is given the "power to make all such needful and salutary by-laws and ordinances \* \* \* as towns \* \* \* have power to make and establish." Pub. Stat., chap. 27, § 15; Stat. 1854, chap. 448, § 35. By Public Statutes, chapter 28, section 2, it is also provided that "chapter 27 \* \* \* shall apply to cities, so far as \* \* \* not inconsistent with the general and special provisions relating thereto; and cities shall be subject to the liabilities and city councils shall have the power of towns." The power of cities and towns to adopt ordinances and by-laws for the preservation and promotion of the health of their inhabitants has often been upheld, as an exercise of the police power, and is one of their most necessary and salutary powers. *Com. v. Patch*, 97 Mass. 221; *Com. v. Curtis*, 9 Allen, 266; *Vardine, Petitioner*, 6 Pick. 187; 1 Dill. Mun. Corp. (3d ed.) 369. The defendant in the present case contends, however, that the ordinance in question is unreasonable and indefinite, and that it imposes duties which he lawfully cannot be required to perform. It appears from the agreed facts, which form a part of the exceptions, that at the time of the complaint, and for a long time prior, the defendant was and had been the owner of a lot of land on Leverett street, which in the rear abutted on and extended to the center of a private passage-way, about four feet wide, which ran northerly and southerly about two hundred and twenty-four feet, between other premises fronting on Leverett and Wall streets, and which was connected with Wall street, through another private passage-way, also about four feet wide. These

passage-ways were laid out and maintained by the abutters thereon for the benefit of all the lots. The land formerly belonged to the city of Boston, which reserved the right to lay a sewer through the whole of said passage-way, and which for many years had kept the passage-ways clear, though always claiming that it was not its duty to do so, but ceased to do it in the spring of 1891, when the street department was reorganized. It is a matter of common observation that there are many such passage-ways in the city of Boston as the one thus described, and we see nothing unreasonable in an ordinance which forbids the owners or occupants of lands abutting on them, and having the right to use them, from allowing filth to remain on that part of them adjoining the lands of such owners or occupants. It is analogous to an ordinance requiring owners or occupants to clear the snow from sidewalks adjoining their respective houses or lands. Goddard, Petitioner, 16 Pick. 504.

In *Pierce v. Bartrum*, Cowp. 269, a by-law of the city of Exeter which provided, among other things, that no person within the walls should keep "any stinking filth, garbage or annoyance within his house, curtilage or back side," was held good, although it is true the point now raised was not before the court. It is for the benefit of the owners and occupants of lands abutting on private passage-ways, and having the right to use them, as well as to the advantage of the public health, that they should be kept free from filth; and the fact that, in order to keep them free from filth, such owners and occupants may be obliged to remove matter which they had no agency in depositing there, or to do what they would not be obliged to do if they did not own or occupy land abutting on a private passage-way, does not render the ordinance unreasonable, or impose upon the owner or occupants duties which they lawfully cannot be required to perform. Goddard, Petitioner, *supra*. No doubt, as argued by the defendant, the object of the city council in passing the ordinance was to compel the removal of the filth from passage-ways. But it could accomplish that as well by making it penal to suffer filth to remain there as by a direct provision that it should be removed; and we see nothing indefinite in such a provision, or in the omission to provide a time beyond which the filth should not be allowed to remain. The words "suffer \* \* \* to remain" imply an

opportunity to remove, and a failure to do so. Thereupon the offense became complete. It needs no argument to show that, if the city had kept the passage-ways clear for many years under protest, that fact is no defense if the ordinance requires the defendant to do in part the work which the city has done.

Nor is it any defense that another ordinance forbids the defendant from removing filth or refuse matter through the streets without a permit from the board of health. If there were no other way of removing the filth except through the streets, which the defendant was forbidden to do, there would be more force in the defendant's objection. But it does not appear that there is not. Indeed, it appears that there is an ordinance making it the duty of the sanitary police, as they are called, to remove "all noxious refuse substances from yards and areas when so placed as to be easily removed." Rev. Ord. Boston 1890, chap. 19. The facts in the present case find that the defendant owned to the center of the way, and had a right to use the passage-way as a way, and that at the time of making the complaint there was and had been for some time filth upon that part of the passage-way abutting and adjoining his land. It is immaterial how the filth came there. The ordinance made it his duty not to suffer it to remain, and he was bound at his peril to see that it did not stay there. *Com. v. Curtis*, *supra*. The unreasonableness and sufficiency of an ordinance or by-law is not to be tested in all cases by its application to extreme cases. *Com. v. Plaisted*, 148 Mass. 382; 19 N. E. Rep'r, 224. Perhaps a proper construction of it might not admit of their being included within it. We think that in the present case the ordinance is not unreasonable or indefinite or oppressive, and that it imposes nothing on the defendant which he lawfully may not be required to do.

2. Of the various grounds contained in the motion to quash, the defendant has argued only three, viz.: That the complaint does not set out any violation of or offense under the ordinance; that it contains no allegation, as it ought, of the length of time the filth had been suffered to remain by the defendant; and that it does not set out any of the defendant's right to use the passage-way. The first two are disposed of by considerations already adverted to. As to the third, it is sufficient, we think, to say that the evident purpose of the statute was to provide that owners or

occupants of lands abutting on a private passage-way, and having a right to use the passage-way as and for a way, should not suffer filth to remain in it. The liability is limited to those owning lands abutting on the passage-way, and having a right to use the way. The language of the complaint follows the language of the ordinance, and we think it plainly means that the defendant had the use of the passage-way as a passage-way would be used ordinarily, *i. e.*, as and for a way, not to swing blinds or project awnings over, and, therefore, includes all the facts necessary to constitute the offense. *Com. v. Barrett*, 108 *Muss.* 302. Whether the right of the defendant to use the way was appurtenant to the land belonging to him or not was immaterial, and, therefore, no allegation concerning the nature of the defendant's right was necessary in the complaint. The city lawfully could adopt an ordinance which made it penal for one owning or occupying land on private passage-ways, and, having an easement of way over the passage-way, to suffer filth to remain on that part of the way adjoining such land. Clearly, the owner or occupant would have the right to remove obstructions from and to repair that portion of the way, and we see no difficulty in holding that the city may provide that he shall not suffer any filth to remain there.

Exceptions overruled.\*

**Police power** — compelling abutting owners to clean or repair the sidewalk. — An ordinance requiring abutting owners to remove snow and ice from the sidewalk in front of their property was held valid in *Carthage v. Frederick*, 8 *Am. R. R. & Corp. Rep.* 538. See, also, *City of Rochester v. Campbell*, 8 *Am. R. R. & Corp. Rep.* 628; *St. Louis v. Connecticut Mutual Life Ins. Co.*, *ante*, p. 303.

## STATE, EX REL. ATTORNEY-GENERAL, v. STANDARD OIL CO.

(Supreme Court of Ohio, March 2, 1892.)

1. CORPORATIONS AND "TRUSTS." "LEGAL ENTITY" OF CORPORATION A FICTION. WHEN IT MAY BE DISREGARDED. That a corporation is a legal entity — apart from the natural persons who compose it, is a mere fiction, introduced for its convenience in the transaction of its business, and of those who do business with it; but, like every other fiction of the law, when urged to an intent and purpose not within its reason and policy, may be disregarded.

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\*Reported in 20 *N. E. Rep'r*, 1146.

2. WHEN ACT OF MAJORITY OF STOCKHOLDERS WILL BE TREATED AS ACT OF THE CORPORATION. Where all, or a majority, of the stockholders composing a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation, and against public policy, and was done in their individual capacities, for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation, and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*.

3. TRUST COMBINATIONS AGAINST PUBLIC POLICY AND VOID. An agreement by which all, or a majority, of the stockholders of a corporation transfer their stock to certain trustees, in consideration of the agreement of the stockholders of other companies and of the members of limited partnerships, engaged in the same business, to do likewise; and by which all are to receive, in lieu of their stocks and interests so transferred, trust certificates, to be issued by the trustees, equal at par to the par value of their stocks and interests; and by which the trustees are empowered, as apparent owners of the stock, to elect directors of the several companies, and thereby control their affairs in the interests of the trusts so created; and are to receive all dividends made by the several companies and limited partnerships, from which, as a common fund, dividends are to be made by the trustees to the holders of the trust certificates — tends to the creation of a monopoly, to control production as well as prices, and is against public policy.

4. QUO WARRANTO TO FORFEIT CHARTER. LIMITATION OF ACTION. A proceeding in *quo warranto* to forfeit the charter of a corporation must, under section 6789 of the Revised Statutes, be commenced within five years after the act complained of was done, whether commenced by the state on relation of the attorney-general or otherwise; but a corporation may be ousted by such proceeding from the exercise of a power or franchise not conferred by law, where the same has not been exercised for a term of twenty years.

**A**PPPLICATION by the state of Ohio, ex rel. David K. Watson, the attorney-general, for a writ of *quo warranto* against the Standard Oil Company. The other facts fully appear in the following statement by Minshall, J. The state, by its attorney-general, commenced this action to oust the defendant of the right to be a corporation, on the ground that it has abused its corporate franchises, by becoming a party to an agreement that is against public policy. The questions are presented by the pleadings — the amended petition, the answer thereto, and the demurrer of the state to the answer — and are as follows:

## "AMENDED PETITION.

"Now comes David K. Watson, the duly elected, qualified and acting attorney-general of the state of Ohio, and gives the court to understand and be informed that on or about the 10th day of January, A. D. 1870, the defendant, the Standard Oil Company, was formed and organized as a corporation under and according to the laws of the state of Ohio. That the only purpose of said defendant, as set forth in its articles of incorporation, is 'the manufacture of petroleum and to deal in petroleum and its products.' That at the time of the defendant's incorporation its capital stock was fixed at \$1,000,000. That subsequently, to-wit, on or about the 12th day of February, A. D. 1872, the defendant's capital stock was increased to the sum of \$2,500,000. That afterward, to-wit, on or about the 13th day of March, A. D. 1875, said capital stock was increased to the sum of \$3,500,000; and that after its organization, as aforesaid, said defendant entered upon and continued generally in the pursuit of its corporate objects, with its principal place of business in the city of Cleveland, in this state, until on or about the date of the trust agreements hereinafter complained of and set forth.

"Plaintiff further avers that, in violation of law and in abuse of its corporate powers, and in the exercise of privileges, rights and franchises not conferred upon it, defendant, on or about the 2d day of January, A. D. 1882, and again on or about the 4th day of said month and year, entered into and became a party to certain trust agreements, and ever since then has, in the manner and to the extent below stated, observed, performed and carried out said agreements, copies of which are hereinafter set out. That said defendant so entered into and became a party to and carried out and observed and performed the same as follows, to wit: All of the owners and holders of its capital stock, including all the officers and directors of said defendant company, signed said agreements, without attaching the corporate name and seal of said defendant company thereto, and the official designation of its officers. That, prior to the dates of the trust agreements aforesaid, defendant's capital stock consisted of thirty-five thousand shares of \$100 each, and upon the signing of said agreements in the manner aforesaid thirty-four thousand nine hundred and ninety-three shares of said stock, belonging to the

persons who signed the agreements in manner above set forth (in what proportions, however, plaintiff is unable to state), were transferred, by defendant's transferring officers, upon defendant's stock-books, to the certain nine trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares and in pursuance of the provisions of said trust agreements; the remaining seven of said shares of stock being retained by or transferred to the directors of defendant company. That, at the time said transfer of stock was made, there were seven directors of defendant company, and each one of the seven held one share of the stock aforesaid; but the number of said directors was thereafter reduced to five, who still hold and vote said seven shares of stock and no more. That in lieu of the transfer of said thirty-four thousand nine hundred and ninety-three shares, as aforesaid, to the nine trustees above mentioned, an equal amount in par value of certificates of the Standard Oil Trust, which were provided for and described in said trust agreements, were issued and delivered by said nine trustees to the persons aforesaid, from whom said nine trustees had received said thirty-four thousand nine hundred and ninety-three shares of stock in defendant company. That the capital stock of said defendant company is still \$3,500,000, and the nine trustees before mentioned still hold and control the thirty-four thousand nine hundred and ninety-three shares thereof which were transferred to them as above stated. That by virtue of so holding and controlling said shares said nine trustees have been ever since the signing of said agreements, and still are, able to choose and have chosen, annually, such boards of directors of defendant company as they (said nine trustees) have seen fit, and are able to, and do, control the action of the defendant in the conduct and management of its business. That some of the directors of defendant company, including its president, have been, since the date of said agreements, and still are, members of the board of nine trustees provided for in said trust agreements as aforesaid, the president of defendant company having been, and being now, the president of said board of nine trustees. That defendant has never taken any corporate action, or made any complaint against its said stockholders or its directors and officers signing said trust agreements, or either of them, nor

against its said stockholders or officers surrendering their stock in the defendant company to said nine trustees, nor against its stockholders or officers or directors receiving the Standard Oil Trust certificates which were issued and delivered to them as aforesaid by said nine trustees in exchange for the thirty-four thousand nine hundred and ninety-three shares of defendant's stock, nor against any of the acts herein recited; and that none of the officers, directors or stockholders of defendant company have at any time objected or made complaint against such surrender and exchange of stock or against any of said recited acts, and, on the contrary, defendant, in its corporate capacity and through its officers and stockholders, has ever since the acts in question acquiesced in such transfer and exchange, and in the annual election by said nine trustees of the directors for defendant, as well as in all said recited acts. That the directors of defendant company who are chosen in manner aforesaid, either directly or through their employes, manage the business of that company so as not to conflict with the policy fixed from time to time by the nine trustees aforesaid. That the net earnings of defendant company have been, ever since the signing of said agreements, and still are from time to time, declared and paid out as dividends upon its capital stock. That the nine trustees appointed under said trust agreement as aforesaid have received the proportions of such dividends which were properly distributable and payable upon the stock held by said nine trustees in defendant company. That there are a large number of other corporations (plaintiff being unable to ascertain or state the exact number) in the United States, whose organizations were made, stock is held and directors elected, and whose affairs and business and dividends are conducted and paid under and pursuant to the provisions of the trust agreements hereinafter set forth, in a manner and to an extent similar to that herein described in respect to defendant, and from the dividends so accumulated in the hands of said nine trustees dividends are, from time to time, as the interests of the trust justify, declared and paid out by said nine trustees to the holders of the Standard Oil Trust certificates which have been issued by them; so that the holders of the thirty-four thousand nine hundred and ninety-three shares of said Standard Oil Trust certificates which were



received in lieu of a like number of shares of defendant's stock, transferred in manner aforesaid upon the books of defendant company to said nine trustees, do not receive the dividends which are payable from the earnings of defendant company, but receive dividends only from the accumulated earnings aforesaid, which are derived from the various similar companies aforesaid, and held and distributed as aforesaid by said nine trustees.

"The following are correct copies of the two trust agreements hereinbefore mentioned and referred to.

"This agreement made and entered upon this second day of January, A. D. 1882, by and between all the persons who shall now or may hereafter execute the same as parties thereto, witnesseth :

"I. It is intended that the parties to this agreement shall embrace three classes, to-wit :

"(1) All the stockholders and members of the following corporations and limited partnerships, to-wit : Acme Oil Company (New York); Acme Oil Company (Pennsylvania); Atlantic Refining Company of Philadelphia; Bush & Co., Limited; Camden Consolidated Oil Company; Elizabethport Acid Works; Imperial Refining Company, Limited; Chas. Pratt & Co.; Paine, Ablett & Co., Limited; Standard Oil Company (Ohio); Standard Oil Company (Pittsburgh); Smith's Ferry Oil Trans. Company; Solar Oil Company, Limited; Sone & Fleming Manufacturing Company, Limited. Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

"(2) The following individuals, to-wit : W. C. Andrews; Jno. D. Archbold; Lide K. Arter; J. A. Bostwick; Benj. Brewster; D. Bushnell; Thos. C. Bushnell; J. N. Camden; Henry L. Davis; H. M. Flagler; Mrs. H. M. Flagler; H. M. Harma; Geo. W. Chapin; D. M. Harkness; D. H. Harkness, trustee; S. V. Harkness; John Huntington; H. A. Hutchins; Chas. F. G. Heye; O. A. Jennings; Chas. Lockhart; A. M. McGregor; Wm. H. Macy; Wm. H. Macy, Jr.; estate of Josiah Macy, Jr.; Wm. H. Macy, Jr., executor; O. H. Payne; O. H. Payne, trustee; Chas. Pratt; Horace A. Pratt; C. M. Pratt; A. J. Pouch; John

D. Rockefeller ; Wm. Rockefeller ; Henry H. Rogers ; W. P. Thompson ; J. J. Vandegrift ; William T. Wardwell ; W. G. Warden ; Jos. L. Warden ; Warden, Frew & Co. ; Louise O. Wheaton ; Julia H. York ; Geo. H. Vilas ; M. R. Keith ; Geo. F. Chester, trustees. Also all such individuals as may hereafter join in this agreement at the request of the trustees herein provided for.

“(3) A portion of the stockholders and members of the following corporations and limited partnerships, to-wit : American Lubricating Oil Co. ; Baltimore United Oil Co. ; Beacon Oil Co. ; Bush & Denslow Manufacturing Co. ; Central Refining Co. of Pittsburgh ; Chesebrough Manufacturing Co. ; Chess Carley Co. ; Consolidated Tank Line Co. ; Inland Oil Co. ; Keystone Refining Co. ; Maverick Oil Co. ; National Transit Co. ; Portland Kerosene Oil Co. ; Producers’ Consolidated Land and Petroleum Co. ; Signal Oil-Works, Limited ; Thompson & Bedford Co., Limited ; Devoe Manufacturing Co. ; Eclipse Lubricating Oil Co., Limited ; Empire Refining Co., Limited ; Franklin Pipe Co., Limited ; Galena Oil-Works, Limited ; Galena Farm Oil Co., Limited ; Germania Mining Co. ; Vacuum Oil Co. ; H. C. Van Tine & Co., Limited ; Waters-Pierce Oil Co. Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

“II. The parties hereto do covenant and agree to and with each other, each in consideration of the mutual covenants and agreements of the others, as follows :

“(1) As soon as practicable, a corporation shall be formed in each of the following states, under the laws thereof, to-wit : Ohio, New York, Pennsylvania and New Jersey ; provided, however, that instead of organizing a new corporation, any existing charter and organization may be used for the purpose when it can advantageously be done.

“(2) The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum, and all its products, and all the materials used in such businesses ; and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties procuring the charter ; or, if neces-

sary to comply with the law, the powers aforesaid may be restricted and reduced.

“(3) At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other states and territories.

“(4) Each of said corporations shall be known as the “Standard Oil Company of —” (and here shall follow the name of the state or territory by virtue of the laws of which said corporation is organized).

“(5) The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same, in view of the purpose to be accomplished.

“(6) The shares of stock of each of said corporations shall be issued only for money, property or assets, equal, at a fair valuation, to the par value of the stock delivered therefor.

“(7) All of the property, real and personal, assets and business, of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred to and vested in the said several Standard Oil Companies. All of the property, assets and business in or of each particular state shall be transferred to and vested in the Standard Oil Company of that particular state; and, in order to accomplish such purpose, the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to sell, assign, transfer, convey and make over for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets and business of said corporations and limited partnerships. Correct schedules of such property, assets and business shall accompany each transfer.

“(8) The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all the property, real and personal, assets and business, mentioned and embraced in schedules accompanying such sale and transfers to

the Standard Oil Company or companies of the proper state or states, as soon as the said corporations are organized and ready to receive the same.

“(9) The parties embraced in class third of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignment of stocks in the same or similar companies upon the terms herein provided, and that whenever and as often as all the stocks of any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper state, on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the value of the money, property and business assigned to be held in place of the stocks of the company or companies assigning such property.

“(10) The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property and business so transferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors; and no stock of any of said companies shall ever be issued except for money, property or business equal at least to the par value of the stock so issued; nor shall any stock be issued by any of said companies for any purposes, except to the trustees herein provided for to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale and exchange of property by said Standard Oil Companies as fully as they may be authorized to do by their respective charters, provided only that no stock be issued therefor except to said trustees.

“(11) The consideration for any stocks delivered to said trustees as above provided for, as well as for stocks delivered to said

trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Companies so received by said trustees, and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of said Standard Oil Companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do.

“‘III. The trusts upon which said stocks shall be held, and the number, powers and duties of said trustees, shall be as follows :

“‘(1) The number of trustees shall be nine.

“‘(2) J. D. Rockefeller, O. H. Payne and Wm. Rockefeller are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1885.

“‘(3) J. A. Bostwick, H. M. Flager and W. G. Warden are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1884.

“‘(4) Chas. Pratt, Benj. Brewster and Jno. D. Archbold are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1883.

“‘(5) Elections for trustees to succeed those herein appointed shall be held annually at which election a sufficient number of trustees shall be elected to fill all vacancies occurring either from expiration of the term of the office of trustee, or from any other cause. All trustees shall be elected to hold their office for three years, except those elected to fill a vacancy arising from any cause except expiration of term, who shall be elected for the balance of the term of the trustee whose place they are elected to fill. Every trustee shall hold his office until his successor is elected.

“‘(6) Trustees shall be elected by ballot by the owners of trust

certificates or their proxies. At all meetings the owners of trust certificates, who may be registered as such on the books of the trustees, may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names, but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books may be closed for thirty days immediately preceding the annual election. A majority of the shares represented at such election shall elect.

“(7) The annual meeting of the owners of said trust certificates for the election of trustees and for other business shall be held at the office of the trustees in the city of New York, on the first Wednesday of April of each year, unless the place of meeting be changed by the trustees; and said meeting may be adjourned from day to day until its business is completed. Special meetings of the owners of said trust certificates may be called by the majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of holders of trust certificates whenever requested to do so by a petition signed by the holders of ten per cent in value of such certificates. The business of such special meetings shall be confined to the object specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given, by personal notice as far as possible, and by public notice in one of the principal newspapers of each state in which a Standard Oil Company exists, at least ten days before such meeting. At any meeting, a majority in value of the holders of trust certificates represented, consenting thereto, by-laws may be made, amended and repealed, relative to the mode of election of trustees and other business of the holders of trust certificates; provided, however, that said by-laws shall be in conformity with this agreement. By-laws may also be made, amended and repealed at any meeting, by and with the consent of a majority in value of the holders of trust certificates, which alter this agreement relative to the number, powers and duties of the trustees, and to other matters tending to the more efficient accomplishment of the objects for which the trust is created; provided, only, that the essential intents and purposes of this agreement be not thereby changed.

“(8) Whenever a vacancy occurs in the board of trustees more than sixty days prior to the annual meeting for the election of trustees, it shall be the duty of the remaining trustees to call a meeting of the owners of Standard Oil Trust certificates for the purpose of electing a trustee or trustees to fill the vacancy or vacancies. If any vacancy occurs in the board of trustees from any cause within sixty days of the date of the annual meeting for the election of trustees, the vacancy may be filled by a majority of the remaining trustees, or, at their option, may remain vacant until the annual election.

“(9) If, for any reason, at any time, a trustee or trustees shall be appointed by any court to fill any vacancy or vacancies in said board of trustees, the trustee or trustees so appointed shall hold his or their respective office or offices only until a successor or successors shall be elected in the manner above provided for.

“(10) Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust, shall pass to and vest in the successors of said trustees without any formal transfer thereof. But if at any time such formal transfer shall be deemed necessary or advisable, it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee, or the administrator or executor of any deceased trustee, to make said transfer.

“(11) The trustees shall prepare certificates, which shall show the interest of each beneficiary in said trust, and deliver them to the persons properly entitled thereto. They shall be divided into shares of the par value of \$100 each, and shall be known as “Standard Oil Trust Certificates,” and shall be issued subject to all the terms and conditions of this agreement. The trustees shall have power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be signed, attested and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement and by the by-laws herein provided for.

“(12) No certificates shall be issued except for stocks and bonds held in trust, as herein provided for; and the par value of certificates issued by said trustees shall be equal to the par value of the stocks of said Standard Oil Companies, and the appraised value of other bonds and stocks held in trust. The vari-

ous bonds, stocks and moneys held under said trust shall be held for all parties in interest jointly, and the trust certificates so issued shall be the evidence of the interest held by the several parties in this trust. No duplicate certificates shall be issued by the trustees, except upon surrender of the original certificate or certificates for cancellation, or upon satisfactory proof of the loss thereof; and in the latter case they shall require a sufficient bond of indemnity.

“(13) The stocks of the various Standard Oil Companies held in trust by said trustees shall not be sold, assigned or transferred by said trustees, or by the beneficiaries, or by both combined, so long as this trust endures. The stocks and bonds of other corporations, held by said trustees, may be by them exchanged or sold, and the proceeds thereof distributed *pro rata* to the holders of trust certificates, or said proceeds may be held and reinvested by said trustees for the purposes and uses of the trust; provided, however, that said trustees may, from time to time, assign such shares of stock of said Standard Oil Companies as may be necessary to qualify any person or persons chosen or to be chosen as directors and officers of any of said Standard Oil Companies.

“(14) It shall be the duty of said trustees to receive and safely to keep all interest and dividends declared and paid upon any of the said bonds, stocks and moneys held by them in trust, and to distribute all moneys received from such sources or from sales of trust property or otherwise, by declaring and paying dividends upon the Standard Trust certificates as funds accumulate, which, in their judgment, are not needed for the uses and expenses of said trust. The trustees shall, however, keep separate accounts of receipts from interest and dividends, and of receipts from sales or transfers, of trust property; and, in making any distribution of trust funds, in which moneys derived from sales or transfers shall be included, shall render the holders of trust certificates a statement showing what amount of the fund distributed has been derived from such sales or transfers. The said trustees may be also authorized and empowered by a vote of a majority in value of holders of trust certificates, whenever stocks or bonds have accumulated in their hands from money purchases thereof, or the stocks or bonds held by them have increased in value, or stock dividends shall have been declared by any of the



companies whose stocks are held by said trustees, or whenever, from any such cause, it is deemed advisable so to do, to increase the amount of trust certificates to the extent of such increase or accumulation of values, and to divide the same among the persons then owning trust certificates *pro rata*.

“(15) It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and, as far as practicable, over the other companies or partnerships, any portion of whose stock is held in said trust. It shall be their duty, as stockholders of said companies, to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates.

“(16) All the powers of the trustees may be exercised by a majority of their number. They may appoint from their own number an executive and other committees. A majority of each committee shall exercise all the powers which the trustees may confer upon such committee.

“(17) The trustees may employ and pay all such agents and attorneys as they deem necessary in the management of said trust.

“(18) Each trustee shall be entitled to a salary for his services not exceeding \$25,000 per annum, except the president of the board, who may be voted a salary not exceeding \$30,000 per annum, which salaries shall be fixed by said board of trustees. All salaries and expenses connected with or growing out of the trust shall be paid by the trustees from the trust fund.

“(19) The board of trustees shall have its principal office in the city of New York, unless changed by vote of the trustees, at which office, or in some place of safe deposit in said city, the bonds and stocks shall be kept. The trustees shall have power to adopt rules and regulations pertaining to the meetings of the board, the election of officers, and the management of the trust.

“(20) The trustees shall render at each annual meeting a statement of the affairs of the trust. If a termination of the trust be agreed upon as hereinafter provided, or within a reasonable time prior to its termination by lapse of time, the trustees shall furnish to the holders of the trust certificates a true and perfect inven-

tory and appraisement of all stocks and other property held in trust, and a statement of the financial affairs of the various companies whose stocks are held in trust.

“(21) This trust shall continue during the lives of the survivors and survivor of the trustees in this agreement named, and for twenty-one years thereafter; provided, however, that if at any time after the expiration of ten years two-thirds of all the holders in value, or if after the expiration of one year ninety percent of all the holders in value, of trust certificates shall, at a meeting of holders of trust certificates called for that purpose, vote to terminate this trust at some time to be by them then and there fixed, the said trust shall terminate at the date so fixed. If the holders of trust certificates shall vote to terminate the trust as aforesaid, they may, at the same meeting, or at a subsequent meeting called for that purpose, decide by a vote of two-thirds in value of their number the mode in which the affairs of the trust shall be wound up, and whether the trust property shall be distributed; or whether it shall be sold, and the values thereof distributed; or whether part, and, if so, what part, shall be divided and what part shall be sold; and whether such sales shall be public or private. The trustees, who shall continue to hold their offices for that purpose, shall make the distribution in the mode directed, or, if no mode be agreed upon by two-thirds in value as aforesaid, the trustees shall make distribution of the trust property according to law. But said distribution, however made, and whether it be of property or values or of both, shall be just and equitable, and such as to insure to each owner of a trust certificate his due proportion of the trust property or the value thereof.

“(22) If the trust shall be terminated by expiration of the time for which it is created, the distribution of the trust property shall be directed and made in the mode above provided.

“(23) This agreement, together with the registry of certificates, books of accounts, and other books and papers connected with the business of said trust, shall be safely kept at the principal office of said trustees.’

“(Signatures omitted.)

“The plaintiff further avers that after the execution and delivery of the trust agreement aforesaid, to wit: on the 4th day of January, A. D. 1882, in violation of law, and in abuse of its

powers, and in the exercise of privileges and franchises not conferred upon it, the defendant, acting through the same parties as before alleged in respect of the above-recited agreement, together with the subscribers thereto, who were the same as those whose names were subscribed to the other agreement aforesaid, entered into and became a party to, carried out and still continues to observe, perform and carry out, a supplemental trust agreement, which, if not in words and figures, is in substance and effect, as follows :

“Whereas, in and by an agreement dated January 2, 1882, and known as the “Standard Trust Agreement,” the parties thereto did mutually covenant and agree, *inter alia*, as follows, to wit: That corporations to be known as “Standard Oil Companies” of various states should be formed, and that all of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first of said agreement should be transferred to and vested in the said several Standard Oil Companies; that all of the property, assets and business in or of each particular state should be transferred to and vested in the Standard Oil Company of that particular state, and the directors and managers of each and all of the several corporations and associations mentioned in class first were authorized and directed to sell, assign, transfer and convey and make over to the Standard Oil Company or companies of the proper state or states, as soon as said corporations were organized and ready to receive the same, all the property, real and personal, assets and business of said corporations or associations; and whereas, it is not deemed expedient that all of the companies and associations mentioned should transfer their property to the said Standard Oil Companies at the present time, and in case of some companies and associations it may never be deemed expedient that the said transfer should be made, and said companies and associations go out of existence; and whereas, it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer or transfers should take place, if at all: Now, it is hereby mutually agreed between the parties to the said trust agreement, and as supplementary thereto, that the trustees named in the said agreement and their successors shall have the power and authority to decide what companies shall convey their

said property as in said agreement contemplated, and when the said sales and transfers shall take place, if at all; and until said trustees shall so decide each of said companies shall remain in existence and retain its property and business, and the trustees shall hold the stocks thereof in trust, as in said agreement provided. In the exercise of said discretion, the trustees shall act by a majority of their number, as provided in said trust agreement. All portions of said trust agreement relating to this subject shall be considered so changed as to be in harmony with this supplemental agreement. In witness whereof, the said parties have subscribed this agreement this 4th day of January, 1882.'

" (Signatures omitted.)

" Plaintiff further avers that the nine persons who were appointed and named as trustees in and under the provisions of said trust agreements accepted their several positions and entered upon the discharge of the trust duties therein mentioned; that some of said trustees and others to the number of nine, whose names are unknown to plaintiff, have been reappointed and appointed at various times since the execution of said trust agreements, so that nine trustees have been ever since then, and still are, acting thereunder, and each and all of said trustees have been and are non-residents of the state of Ohio; that the offices and principal place of business of said trustees have been, ever since the execution of said trust agreements, and still are, in the city of New York, and the elections of said trustees and business transacted by them at their meetings have been had and done in said city of New York; and that plaintiff had no knowledge of the existence of either of the aforesaid trust agreements, or of the acts hereinbefore recited, until the latter part of the year 1889.

" Plaintiff further avers that, by reason of defendant's stockholders, directors and officers signing and entering into said trust agreements and carrying out their provisions and surrendering their stock in defendant and accepting in lieu thereof certificates issued by the nine trustees aforesaid, and permitting the corporate powers, business and property of the defendant to be exercised, conducted and controlled by said trustees in manner aforesaid, and by reason of the acts and omissions of defendant hereinbefore recited, said defendant has forfeited its corporate rights, privileges, powers and franchises.

"Wherefore, plaintiff prays that defendant be found and adjudged to have forfeited and surrendered its corporate rights, privileges, powers and franchises, and that it be ousted and excluded therefrom, and that it be dissolved, and that such other relief be granted in the premises as to the court may seem just and proper.

"DAVID K. WATSON,  
*"Attorney-General."*

"ANSWER TO AMENDED PETITION.

"Now comes the defendant, and, answering the amended petition filed herein, admits — (1) That David K. Watson is the duly elected, qualified, and acting attorney-general of the state of Ohio. (2) Admits that defendant was formed and organized as a corporation under and according to the laws of the state of Ohio, on or about the time alleged, and for the purposes stated. (3) That the capital stock of the company was originally fixed at \$1,000,000, and afterward increased at the times and in the sums alleged. (4) It admits that after its organization it entered upon and continued generally in the pursuit of its corporate objects with its principal place of business in the city of Cleveland, Ohio; but it avers that it did this not only up to the date of the so-called 'Trust Agreements,' but that it has ever maintained such corporate organization, and has ever pursued, and still does pursue, in accordance with law, the objects and purposes for which it was incorporated, with its principal place of business at the city of Cleveland. (5) Defendant admits that at one time its board was composed of seven directors, and that the number was afterward reduced to five. It admits that its president is also president of a board of trustees, whose office and principal place of business is now in the city of New York, and it admits that it has always, when certificates of its stock have been presented to it with transfers duly indorsed thereon in accordance with its by-laws, issued new certificates of stock to the transferees thereof, as it was its duty to do; and it denies that it has legal power to do otherwise. Defendant denies that it did on or about the 2d day of January, A. D. 1882, or again on or about the 4th day of said month and year, or at any other time, enter into or become a party to either or both of the agreements in said petition set forth, and

it denies that it has at any time or in any manner acquiesced in, observed, performed or carried out either or both of said agreements. Defendant denies that it entered into or became a party to, or carried out, observed or performed the said agreements in the manner alleged in said petition, or that it became a party to or carried out, observed or performed the said agreements, or either of them, in any form or manner whatsoever. Defendant admits that prior to the dates of said agreements defendant's capital stock consisted of thirty-five thousand shares of \$100 each, and it avers that the amount of its capital stock and shares remain unchanged. And it alleges that its corporate powers, business and property are exercised, conducted and controlled solely by its board of directors, a majority of whom are citizens of the state of Ohio, annually elected by its stockholders; and that dividends of its profits are regularly declared by its board of directors, and paid to the holders of its stock appearing as such on its stock books. That it has always, and still does, maintain its independent corporate action, and ever has, and still does, manage its business through its board of directors, in accordance with its charter, without injury to the public, but with benefit thereto, by increasing the variety and quantity of the products of petroleum, improving their quality, and greatly cheapening their price to the consuming public.

"Defendant, further answering, says, that it is informed and believes that on or about the dates alleged in said petition, to-wit, the 2d and 4th of January, 1882, the individuals named in said agreement, being the same individuals who executed said agreement, and being then both in common and severally owners of all or of the greater part of the stocks of each of the corporations and limited partnership mentioned in said agreements, and owning other interest in the oil business in partnership, said corporations having been either organized by said individuals for the purpose of carrying on the oil business in its different branches in different localities and states, or the stocks thereof having been obtained by purchase with a like intent, did enter into the agreements set forth, and to facilitate the purposes therein set forth of covering the said partnership interests into corporate interests, and of so readjusting and consolidating the aforesaid corporate interests in the modes provided by the laws of the various states

which require the assent of stockholders thereto as to have the business in each state, so far as legally possible, conducted by one corporation in each state in which the business was located, did assign their stocks to trustees, the individuals named as trustees being prior to and at the date of said agreement absolute owners and holders of a large majority of said stocks in said companies and in defendant company; and as such absolute owners and holders the said individuals long prior to the said agreement had the voting power and elected the directors of defendant company, and exercised such control of defendant company as a majority of stockholders legally may exercise; and avers that by virtue of said agreements and any thing done thereunder said voting power and control was not and has not been in any manner altered, nor was it nor has it been vested in persons not entitled thereto by virtue of absolute ownership of stocks in defendant company. And defendant alleges that said agreements were agreements of individuals in their individual capacity and with reference to their individual property, and were not, nor were they designed to be, corporate agreements; and defendant denies that said agreements have illegally affected it in its corporate capacity, or that defendant has permitted its corporate powers, business and property to be exercised, conducted and controlled in an illegal manner. Defendant says by way of further answer and defense that if said action by said stockholders, in becoming parties to the several agreements alleged in the petition in their individual capacity and with reference to their individual property, shall be deemed and held by this court to have been the corporate act of defendant, and if the signing by the said stockholders of the said several agreements as aforesaid shall be deemed and held by this court to be a cause for forfeiture of the charter of this defendant, then this defendant says that such act was done and committed more than five years before the filing of the petition herein, and that the cause of action is, therefore, barred. Wherefore, defendant prays to be hence dismissed, with judgment for its costs.

"STANDARD OIL CO.

"By M. R. KEITH and VIRGIL P. KLINE

*"Is Attorneys."*

The state, by its attorney-general, demurred, on the ground that the answer states no defense to the action.

*David K. Watson*, attorney-general, and *John W. Warrington* for relator. *M. R. Keith*, *Virgil P. Kline*, *S. C. T. Dodd* and *Jos. H. Choate* for defendant.

MINSHALL, J. (after stating the facts). Three questions arise upon the pleadings: (1) Should the defendant, the Standard Oil Company, be regarded as a party in its corporate capacity to the agreement constituting the Standard Oil Trust? (2) Had the company power to become a party to such an agreement? (3) If so, is the right of the state to demand a forfeiture of its corporate franchises, or of the power to make and perform such agreements, barred by lapse of time?

1. It will be observed on reading the answer that while the defendant denies that it "entered into or became a party to either or both of the agreements in said petition set forth," and also "denies that it has at any time or in any manner acquiesced in or observed, performed or carried out either or both of said agreements," it does not deny the averment of the petition that "all of the owners and holders of its capital stock, including all the officers and directors of said company, signed said agreements." Nor could it have been the intention to do so, as the answer proceeds to admit "that it [the corporation] is informed and believes that the individuals named in the agreement, being the same individuals who executed" it, "did enter into the agreements set forth" in the petition, claiming "that said agreements were agreements of individuals in their individual capacity and with reference to their individual property, and were not, nor were they designed to be, corporate agreements." The claim is based upon the argument that the corporation is a legal entity, separate from its stockholders; that in it is vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf by its corporate agencies, acting within the legitimate scope of their powers; that its stockholders are not the corporation; that their shares are their individual property, and that they may each and all dispose of and make such agreements affecting their shares as best suit their private interest; and that no such acts and agreements of stockholders, subservient of their private interests, can be ascribed to the company as a separate entity, though done and con-



curred in by each and all of its stockholders. The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim *in fictione juris subsistit æquitas* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts. Broom Leg. Max. 130. "It is a certain rule," says Lord Mansfield, C. J., "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted." *Johnson v. Smith*, 2 Burrows, 962.

No reason is perceived why the principles applicable to fictions in general should not apply to the fiction "that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented." One author seems to think that it has outlived its usefulness; that it is "a stumbling-block in the advance of corporation law toward the discrimination of the real rights of men and women," and should be abandoned. *Tayl. Corp.*, § 51. Among the many attempts that have been made to define the nature of a corporation that given by Mr. Kyd, discarding, or at least not adopting, the metaphysical distinction of a legal entity separate from the persons comprising it, is certainly the most practical, presenting, as it does, the real nature of a corporation as seen in its constituents, and in the manner that it is formed and transacts its business. His definition is: "A collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law

with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence." 1 Kyd Corp. 13. In brief, then, a corporation is a collection of many individuals, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual. "The statement," says Mr. Morawetz, "that a corporation is an artificial person or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact." See his work on Corporations, § 227. So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, when the question is as to whether a certain act was the act of the corporation or of its stockholders, cannot be decisive of the question, and is, therefore, illogical; for it may as likely lead to a false as to a true result.

Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined whether the act in question, though done by shareholders — that is to say, by the persons uniting in one body — was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but as a matter of fact, to control the corporation, and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because, the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when

acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then in one department of the law fraud would enjoy an immunity awarded to it in no other.

Therefore, the real question we are now to determine is whether it appears from the face of the pleadings, giving effect to all the denials of fact contained in the answer, that the execution of the agreement set forth in the petition should be imputed to the association of persons constituting the Standard Oil Company of Ohio, acting in their corporate capacity. The agreement provides, in the first place, that the parties to it shall be divided into three classes, the first class to embrace all the stockholders and members of certain corporations and limited partnerships, the defendant, the Standard Oil Company of Ohio, being one. It is then covenanted by the parties that as soon as practicable a corporation shall be formed in each of certain states, under the laws thereof (Ohio being one), to mine for, produce, manufacture, refine and deal in petroleum and all its products, with the proviso, however, that, instead of organizing a new corporation, any existing one "may be used for the purpose when it can advantageously be done," and in Ohio the defendant has been so used. In a subsequent part of the agreement nine trustees are selected, their powers and duties are defined, and provision made for the selection of their successors. As will hereafter appear, it is made the duty of the parties to the agreement to transfer their stocks or interests in their respective companies or firms to these trustees, who hold the same in trust, but with the power to vote on the same as though the real owners; in consideration of which trust certificates are issued to the owners, who, as the owners of such certificates, elect the successors of the trustees. It is then provided that all the property, assets and business of the corporations and limited partnerships embraced in the first class "shall be transferred to and vested in the said several Standard Oil Companies." And in order to accomplish this purpose it is provided that "the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to

sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets and business of said corporations and limited partnerships."

Now, in the case of the defendant it will be observed that this contemplated, and could not have been accomplished without, corporate action. The Standard Oil Company of Ohio was required to transfer all its property, assets and business to a new company, to be organized in the state; and this was to be accomplished by the obligation imposed on its members and stockholders, all of whom are parties to the agreement, to authorize and require the directors and managers to make the transfer. The property and assets of the corporation could only be transferred by a corporate act, and the agreement could not, in this respect, be carried into effect, other than by such corporate act, and clearly indicates that the purpose of the stockholders of the defendant in becoming a party to it was to affect their property and business as a corporation; in other words, was to act in their corporate, and not in their individual capacity. The subsequent agreement of January 4, 1882, does not materially change the original agreement in this regard. Reciting "that it is not deemed expedient that all of the companies and associations should transfer their property to the said Standard Oil Companies at the present time," and "that it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer" should be made, it provides that, "until said trustees should so decide, each of said companies shall remain in existence and retain its property and business; and the trustees shall hold the stock thereof in trust as in said agreement provided." So that, under the agreement as modified, the directors and managers of the defendant may be required by its stockholders and members, all of whom are parties to the agreement, to make the transfer of the property and business of the defendant whenever the trustees may, in their discretion, direct. The effectiveness of this provision to secure all intended by it may be better understood by observing that "the directors and managers," "the stockholders and members," and "the trustees" here mentioned are substantially the same persons, occu-

pying these different relations at one and the same time. It signifies nothing that the transfer here provided for has not, as respects the defendant, been made. It does not change the evidence it affords of the purpose and object of the members of the corporation in becoming parties to the agreement.

Again, the agreement, as performed by the members of the defendant, as effectually places the property and business of the defendant under the control and management of the Standard Oil Trust as if the same had been transferred as provided in the original agreement. It is averred in the petition, and not denied in the answer, "that prior to the dates of the trust agreements aforesaid defendant's capital stock consisted of thirty-five thousand shares of \$100 each, and upon the signing of said agreements in the manner aforesaid thirty-four thousand nine hundred and ninety-three shares of said stock, belonging to the persons who signed the agreements in manner above set forth (in what proportions, however, plaintiff is unable to state), were transferred, by defendant's transferring officers, upon defendant's stock-books, to the certain nine trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares, and in pursuance of the provisions of said trust agreements, the remaining seven of said shares of stock being retained by or transferred to the directors of defendant company. That at the time said transfer of stock was made there were seven directors of defendant, and each one of the seven held one share of the stock aforesaid, but the number of said directors was thereafter reduced to five, who still hold and vote said seven shares of stock, and no more. That in lieu of the transfer of said thirty-four thousand nine hundred and ninety-three shares, as aforesaid, to the nine trustees above mentioned, an equal amount, in par value, of certificates of the Standard Oil Trust, which were provided for and described in said trust agreements, was issued and delivered by said nine trustees to the persons aforesaid, from whom said nine trustees had received said thirty-four thousand nine hundred and ninety-three shares of stock in defendant company. That the capital stock of said defendant company is still \$3,500,000, and the nine trustees before mentioned still hold and control the thirty-four thousand nine hundred and ninety-three shares thereof which were transferred to them as above stated." So that all but seven

of the thirty-five thousand shares of the defendant's capital stock has been transferred by the owners, who are parties to the agreement, to the trustees of the Standard Oil Trust, and continue to be held in trust, as appears by the supplemental agreement, the transferrers receiving in lieu thereof, trust certificates equal at par value to the par value of the stock received.

The control which this gives and was intended to give over the business of the defendant appears from the following provision contained in the trust agreement: "It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships, any portion of whose stock is held in said trust. It shall be their duty, as stockholders of said companies, to elect as directors and officers thereof, faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates." Thus the trustees, as the legal owners of the stock, may not only elect who they please, but may elect themselves, as directors of the defendant; and not only may manage, but it is their duty to have "the affairs" of the defendant managed and directed in the manner they may deem most conducive to the best interests of the holders of the trust certificates. In other words, it is to be managed in the interests of the Standard Oil Trust, whose principal place of business is in New York city, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; for the holders of the trust certificates received in exchange for their stock transferred to the trustees remain, in law and in equity, the real owners of the stock so transferred. And the averment in the answer that the dividends of the company are paid to the holders of its stock, "appearing as such on its stock-books," is immaterial, since these persons are not the owners, but the trustees of the stock. In fact the averment is simply a part of the evidence that the company, through its directors, recognizes and performs the agreement on its part. The payment of its dividends to the persons

appearing as stockholders on its stock-books is what enables the parties to the agreement to realize the primary object of the trust agreement—the accumulation of the earnings of the various companies, partnerships and individuals named in the agreement as a common fund, from which the holders of the trust certificates are to be paid dividends when declared by the trustees, and whereby many separate interests, being united under one management, form a virtual monopoly, through the power acquired, of so controlling the production and price of petroleum and its products as to destroy competition.

Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act.

It, therefore, follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which,

through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*.

2. That the nature of the agreement is such as to preclude the defendant from becoming a party to it is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have "the affairs" of the several companies managed in a manner most conducive to the interests of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay, more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformably to the purpose for which it was created by the laws of its state. By this agreement—indirectly it is true, but none the less effectually—the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York city, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining and dealing in it and all its products throughout the country and by which it might not merely control the production, but the price, at its pleasure. All such associations are



contrary to the policy of our state and void. *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Candle Co.*, 47 Ohio St. 320; 24 N. E. Rep'r, 660. "The word 'trusts,'" says Mr. Cook, "was first used to mean an agreement between many stockholders in many corporations to place all their stock in the hands of trustees and receive therefor trust certificates from the trustees. The stockholders thereby consolidated their interests, and became trust certificate holders. The trustees own the stock, vote it, elect the officers of the various corporations, control the business, receive all the dividends on the stock, and use all these dividends to pay dividends on the trust certificates. The trustees are periodically elected by the trust certificate holders. The purpose of the 'trust' is to control prices, prevent competition and cheapen the cost of production. The Standard Oil Trust, the American Cotton Seed Oil Trust, and the Sugar Trust are examples of this method of combination." *Cook Stocks*, § 503a. See, also, *Wait Insolv. Corp.* § 478.

Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended, and is well answered in *Richardson v. Buhl*, 77 Mich. 632; 43 N. W. Rep'r, 1102. After commenting on the tendency of the combination known as the "Diamond Match Company" to prevent fair competition and to control prices, Champlin, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree." Monopolies have always been regarded as contrary to the spirit and policy of the common law. The objections are stated in the "Case on Monopolies," *Darcy v. Allein*, Coke, pt. 11, 84b. They are these: (1) "That the price of the

same commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases." (2) "The incident to a monopoly is that, after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the common wealth." (3) "It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art of trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary." The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employes or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited the monopoly had been created by letters-patent. But the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same whether created by patent or by an extensive combination among those engaged in similar industries, controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust.

3. The defendant relies upon a provision in section 6789, Revised Statutes, as a bar to the action. That provision is as follows: "Nothing in this chapter contained shall authorize an action against a corporation for forfeiture of charter, unless the same be commenced within five years after the act complained of was done or committed." It is contended, however, by counsel for the plaintiff, that this section does not apply to a proceeding instituted on behalf of the state by the attorney-general to forfeit the charter of a corporation; that it was only intended to apply to like proceedings by prosecuting attorneys. The argument is based upon what is claimed to have been the law prior to the revision, and that there could have been no intention to

change it in this regard by the above provision. We cannot adopt this conclusion. It is contained in the very chapter under which the proceeding was commenced by the attorney-general. It contains no exception, and we are not warranted in making one against the plain language of the statute. It is further contended that the provision does not apply by reason of the fact, as averred in the petition, "that the plaintiff had no knowledge of the existence of either of the aforesaid agreements, or of the acts hereinbefore recited, until the latter part of the year 1889." The general rule is that a party's want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor; and the only exception is concealment or fraud on the part of the defendant, which is expressly confined by our statute to "an action for relief on the ground of fraud." Rev. St., § 4982. This is not such an action, and fraud in fact is not averred; it is simply want of knowledge on the part of the plaintiff. But the whole of section 6789, Revised Statutes, is not quoted by the defendant. It further proceeds: "Nor shall an action be brought against a corporation for the exercise of a power or franchise under its charter which it has used and exercised for a term of twenty years." Therefore, within that time such a proceeding may be brought. The defendant, as we have shown, in making and entering into the trust agreements, exercised a power for which it had no authority under the laws of this state, and is continuing to perform the agreement on its part.

In addition to a prayer for the forfeiture of the defendant's right to be a corporation, the state prays for such other relief as to the court may seem just and proper; and, in the opinion of the court, the defendant should be ousted from the power to make and perform the agreement set forth in the petition, or any part of it. And in this connection it is proper to say that, in the judgment of the court, if the company, through its directors or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for it in the trust agreement, or should hereafter make such transfers, or should pay dividends to them instead of to the real owners of the shares, or should permit such trustees to vote on shares so held by them in

the election of its directors, in every such case it must be regarded and held as performing the agreement in violation of the judgment of this court. Judgment ousting the defendant from the right to make the agreement set forth in the petition, and of the power to perform the same.\*

"Trusts."—The previous decisions upon "trusts" are reported in this series as follows: Match Trust, *Richardson v. Buhl*, 1 Am. R. R. & Corp. Rep. 584; Gas Trust, *People, ex rel. Peabody, v. Chicago Gas Trust*, 1 Am. R. R. & Corp. Rep. 532; Sugar Trust, *People v. North River Sugar Refining Co.*, 1 Am. R. R. & Corp. Rep. 587; Electric Carbon Trust, *Pittsburgh Carbon Co. v. McMillen*, 1 Am. R. R. & Corp. Rep. 588; Whiskey Trust, *State v. Nebraska Distilling Co.*, 1 Am. R. R. & Corp. Rep. 604; The Cotton Seed Oil Trust, *Mallory v. Hanau Oil Works*, 1 Am. R. R. & Corp. Rep. 683, n. The subject is treated in a note to *State v. Nebraska Distilling Co.*, at p. 630.

The following cases upon pooling arrangements between railroad companies are also upon substantially the same subject: *Manchester, etc., R. Co. v. Concord R. Co.*, 8 Am. R. R. & Corp. Rep. 22; *Cleveland, etc., R. Co. v. Closser*, 8 Am. R. R. & Corp. Rep. 686.

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## McCONNELL V. PEDIGO ET AL.

(Court of Appeals of Kentucky, Jan. 14, 1892.)

1. RAILROAD COMPANIES. RIGHT TO GRANT AND ENFORCE EXCLUSIVE PRIVILEGE OF STANDING HACKS AT DEPOT PLATFORM. A railroad company cannot, by granting to one person the exclusive privilege of standing hacks at the platform of its depot, prevent other persons from bringing their hacks into the depot grounds, and soliciting for the carriage of passengers from the depot, so long as they do not interfere with the company's business.

APPEAL from circuit court, Barren county. Suit by J. D. McConnell against one Pedigo and another for an injunction. Judgment for defendants. Plaintiff appeals. Affirmed.

*Wm. Lindsay and Porter & McQuown* for appellant. *George T. Duff and Thomas H. Hines* for appellees.

PRYOR, J. This cause comes from the superior court. The Louisville and Nashville Railroad Company by contract agreed to give to McConnell the exclusive privilege of standing hacks at the platform of its depot in Glasgow, in consideration that McConnell

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\* Reported in 30 N. E. Rep'r, 279.

would carry the mails from the depot to the post-office in that town, the railroad company, under its contract with the government, being compelled to deliver the mail on schedule time. The privilege is conferred to the exclusion of all other public hacks or vehicles from the hotels of the town. The contract was being executed by McConnell, when the defendants, Pedigo & Hays, undertook to transport passengers to and from the depot, and claimed the right to stand their hacks on the ground near or at the depot, when in doing so they did not interfere with the business of the railroad company. The result was an injunction enjoining the defendants from interfering with the rights of McConnell under his contract with the railroad company, and, the injunction being dissolved and the action dismissed, the case is brought to this court. There is no testimony whatever showing that the hacks of the defendants or their driver interfered in any way with the employes of the railroad company in the discharge of their business; and the sole question arises, has the company the right to grant such exclusive privilege? The hacks of the defendants do not stand at or near the depot where the mails are received by the plaintiff. Their drivers do not annoy the passengers by soliciting their custom, or taking charge of their baggage, but stand with their hacks ready to receive passengers who desire to be carried to the hotels or other places in the city, and the only ground for the injunction is that it lessens the profits of the plaintiff under his agreement with the railroad company. It is difficult to define the extent of the power of railroad corporations in prescribing rules and regulations for the conduct of their business. They have the right to protect the company and its employes from such imposition and annoyance as interferes with the discharge of their duties. No employe should be obstructed in the discharge of his duty when controlling the trains or in charge of the depot and its grounds. Crowds of persons who have no business on the platform, and who go from curiosity to see the trains arrive and depart may be required to leave, so as to give proper ingress and egress to those who have the right to be on the platform. The company may inclose its platform, and prevent any one from entering except those who have business with the company, or desire to travel on the cars. The passengers, with their baggage, may be required to enter the omnibus or hacks outside of the depot platform, if deemed nec-

essary for the successful and convenient conduct of the business; but a regulation that does not pertain to their business, or that discriminates by driving from their depots those who are engaged in a public employment, and whose duty it is to provide for their guests and the traveling public, resulting in a monopoly of the particular business, is unauthorized by its charter, and in palpable violation of the rights of others. The hotel-keeper has the right to have his hack at the depot convenient for those who may desire to patronize him; and the railroad company, in undertaking to say that no one shall approach the depot for that purpose except those it may select, is going outside of its charter and regulating the business of others, over whom they have no control. This is not a continuous line of transportation, where the obligation is with the company to transport the passenger from the terminus of its railway to some other road, under a special contract; nor is the plaintiff operating under the charter of any transfer company that gives him any peculiar privileges by reason of the public service he undertakes. The company has undertaken, for a moneyed consideration or services equivalent thereto, to control the carrying of passengers from its depot to the hotels in the city, and if this power is recognized as being within what is termed "reasonable regulation" in the conduct of its business, the company can deny to any one carrying for it the right of access to its depot for passengers and freight, and thereby monopolize the entire business of transporting passengers and freight to their proper destination within the city or town where the depot may happen to be located. The case of *Parker v. Railway Co.*, reported in 86 E. C. L. 46, is referred to as sustaining the exercise of such a power on the part of the railroad corporation. There it was held that an omnibus proprietor, carrying passengers for hire to and from a station, could not maintain an action against the company for refusing to allow him to drive his vehicle in the station yard. It may have been that the freight was taken from the station yard in that case, and delivered to the carrier on the outside, and the passengers refused to enter the omnibus after leaving the station yard. The whole may have been inclosed, as is the case in many of the large cities, for the protection of the freight and passengers, but the facts here present no such case. In the case referred to, the exclusion of the carrier was based on the ground

that the plaintiff was seeking to appropriate the private property of the railway company for his own benefit, and he was in fact a trespasser, unless he desired to use the railway for the purpose contemplated by the company. Cases have been cited by counsel sustaining the right of the corporation to make such a contract as in this case, to the exclusion of all others. In *Railroad Co. v. Tripp*, reported in 147 Mass. 35; 17 N. E. Rep'r, 89, the right of a railway company to grant to one person the exclusive right of coming upon its grounds to take baggage or merchandise was upheld, and the facts of that case in most of its features are similar to the case being considered. The chief justice and two of the associate judges dissented from the opinion of the majority, and said that such a regulation would tend "to establish a monopoly not granted by the charter, which might be solely for its own benefit, and not for the benefit of the public." It is true there was a statute in that state requiring that every railroad should give to all persons or companies reasonable and equal terms and facilities and accommodations for the transportation of themselves, their agents, and of any merchandise upon its railroad, and for the use of its depot and other grounds; still it is evident the dissent by the minority of that court proceeded upon the idea that the public had an interest in the question, and that to give to the railway company the exclusive right to say what persons should come upon its grounds to receive passengers and freight would not only create a monopoly, but subject those who travel and have transported freight over its road to great inconvenience. It is saying to the passenger: "You can enter the hack of McConnell on the depot grounds, and be carried to any part of the city of Glasgow; but if you want to ride in any other public conveyance you must leave our grounds to find one. McConnell may charge fifty cents for carrying, while others are willing to carry for half price; still as the first charge is reasonable, you must submit." Such a contract prevents competition, and makes such a discrimination as is unreasonable and detrimental to the public. There is no obligation on the company to take the passenger or his freight from the depot, but still it is insisted that the railway company has the right to name the party that shall carry him, to the exclusion of all others. The passenger, under this contract between the railway company and McConnell, may want to ride in defend-

ant's hack; still the latter is not allowed to enter the grounds, but the passenger must be subjected to the inconvenience of leaving the grounds of the company to obtain the vehicle in which he prefers to ride. It is conceded that the passenger in a hack not belonging to McConnell may be driven to the usual place of leaving the hack and entering the car, but it is then insisted that this hackman must leave the grounds, take his position outside, and, when the passenger returns, the latter must go to him, and not the hackman to the passenger, and for no other reason than the fact of this contract giving the exclusive privilege to McConnell. It is admitted that there is no interference with the delivery of the mail or with any regulation for the conduct of the company's business, and the ground for the injunction is based on the idea that, although the railway company has terminated its contract with the passenger by delivering him safely at its depot, it still has the right to carry the passenger from the depot to his home or the hotel, or can give the exclusive right to another. We cannot assent to such a doctrine. This entire question is well discussed and decided in the case of *Railway Co. v. Langlois* (Mont.), 24 Pac. Rep'r, 209, where a like privilege was attempted to be conferred on Lavell & Bros., and it was held that it was not such a regulation as the carrier had the right to make. In that case there was a statute preventing a discrimination in the transportation of freight and passengers; but regardless of the statute, as the court would no doubt have adjudged in that case, the public interests required that no such control should be exercised by any corporation transporting passengers or freight. There is no question here affecting the safety or comfort of passengers at the depot, but there arises from this contract, if enforced, an inconvenience to the passenger and the public that the company has no right to create, either by the provisions of its charter or for the reason that it is the owner of the property on which the depot stands, and the court below properly dissolved the injunction.

The judgment is affirmed.\*

**Railroad companies — right to grant and enforce exclusive privilege to solicit patronage or stand hacks at depot.**—There is no doubt about the power of a railroad company to make and enforce reasonable rules and regulations to promote the comfort, convenience and safety of passengers and the

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\* Reported in 18 S. W. Rep'r. 15.



proper dispatch of business at their various depots. *Landrigan v. State*, 31 Ark. 50; *Commonwealth v. Power*, 7 Met. 506; *Hall v. Power*, 12 Met. 482; *Dickerman v. St. Paul Union Depot Co.*, 3 Am. R. R. & Corp. Rep. 374, and note; *Pierce Railroads*, 248; 1 *Redfield Railroads*, 98-97. Such rules and regulations, however, operating alike upon all, are very different from arrangements, such as are passed upon in the principal case, in which special privileges are attempted to be secured to one or a few. The cases in which the validity of such arrangements are directly involved, are few in number, and are, we believe, in accord with the principal case with one exception. In the case of *Montana Union Ry. Co. v. Langlois*, 9 Mont. 419; 24 Pac. Rep'r, 209, referred to in the principal case, the railroad company had a station at South Butte, distant a mile and half from the city of Butte, which was only reached by stage. The company entered into a contract with Lovell Bros., by which it gave them the exclusive privilege of standing hacks at that part of the depot platform at South Butte most convenient for passengers, and Lovell Bros. agreed to have at the depot upon the arrival of all trains, an ample supply of hacks and omnibuses for the safe and comfortable conveyance of passengers to the city of Butte. The defendants were also hack and omnibus proprietors, and had persisted in standing their hacks at the platform and taking passengers therefrom, in defiance of the company and of its contract with Lovell Bros. The suit was a bill by the company to enjoin the defendants from standing or placing their hacks, etc., at the platform in violation of the exclusive privileges granted to Lovell Bros. by the contract. A decree denying the relief prayed was affirmed. It was held that all persons who took or left the trains at the station in question were entitled to equal conveniences and opportunities to approach the station or depart therefrom, whether they employed Lovell Bros. or any other public hack, or their own private conveyance. The court say that the "controversy must be solved by a consideration of the mutual rights of the appellant as a common carrier, and its passengers." They argue that the traveling public are entitled to the benefit of competition among those who seek their patronage for conveyance to and from the station, and that they cannot have this benefit unless those who are engaged in such service are admitted to the depot grounds upon equal terms. The opinion quotes the provision of the state constitution that "no discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company between persons or places within the State," but no argument is based thereon. The case of *Railroad Co. v. Tripp*, 147 Mass. 35, is reviewed and disapproved, and the final conclusion of the court is thus stated: "Upon grounds of sound reason, public policy and the general principles of law governing common carriers, as well as the provisions of the constitution, we believe the order of the court below ought to be affirmed."

In *Kalamazoo Hack & Bus Co. v. Sootama*, 84 Mich. 194; 47 N. W. Rep'r. 667, the following facts appeared. The K. & H. Construction Company being engaged in operating the C., K. & S. railroad, and being in possession of the station and grounds at Kalamazoo, leased to the plaintiff company for two years, a certain portion of the grounds, including seventy feet of the depot platform, to be used only as an omnibus, baggage wagon and hack stand, at and about the arrival and departure of trains upon said railway. The de-

defendant stood his hack upon the leased ground and refused to move when requested and the plaintiff sued in trespass. Prior to the lease the space in question had been used indiscriminately by the hack and busmen of the city. It embraced the most desirable portion of the platform for the purpose of taking up and setting down passengers. No misconduct on the part of the defendant at any time was shown or claimed. The plaintiff gave evidence in its behalf upon the trial in the circuit, tending to show that, in the selling by the construction company of tickets upon their road to points upon other roads, west of Kalamazoo, a coupon was attached to the ticket entitling the passenger to transfer with baggage across the city of Kalamazoo to the railway station at which the journey was to be resumed, and that an arrangement had been entered into with the plaintiff to perform such service, and carry such baggage and passengers; that, prior to the making of the lease, there had been trouble between the hackmen and the busmen at the depot. Hackmen not connected with the plaintiff's line, in some instances, solicited and secured passengers, who supposed they were to be carried on these transfer coupons, and, at the end of the trip, refused to accept such coupons, and charged them for so carrying them. This made trouble between the railroad company and passengers, and also was the cause of disorder and quarrels between the various hack and busmen about the depot, and that the lease was made to avoid such trouble and annoyance.

There was a judgment for the defendant which the supreme court affirmed. The court says: "The granting of this exclusive privilege to occupy this favored spot of ground, and one theretofore used customarily by all hackmen and busmen, to the plaintiff, was a discrimination against the defendant, as well as all other hackmen and busmen not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds, for the standing of hacks and busses, and the solicitation of passengers therefor. Howell Statutes, section 3355, provides that 'all railroad corporations shall grant equal facilities for the transportation of passengers and freights to all persons, companies or corporations.' A violation of this statute is punished by a penalty. This statute evidently does not relate entirely to the mere carriage in the cars of the road. To be effective it must be construed to include also not only the receiving of such passengers and freights at its depots, but, as well, the receiving of them by other 'persons, companies or corporations,' at the point upon its road where the carriage ends. The access to its depots must be free and equal to all, whether it be to take passage or to leave the trains. No railroad company, under this statute, would be permitted to give to one hack and bus company exclusive, or even better access to its depots than to others in the carriage of passengers or freights to its trains. Nor can it any more appropriately give such exclusive or better privilege to such company taking passengers or freights from its trains, to be transported from thence elsewhere. Therefore, the circuit court was right in directing the verdict as he did. But independently of the statute upon principle, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from the trains and depots, and it probably can prohibit all persons from soliciting business for

themselves upon its premises; but it cannot, arbitrarily, admit one common carrier of passengers or freight to its depots or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure. Such rules or regulations must touch and affect all alike. It may determine the distance from its depot or track at which persons soliciting passengers may stand while on its grounds, but this determination must affect and apply to all. To permit a railroad company upon any pretense, except of wrong or misconduct on the part of the person excluded, to allow one hackman or line of hacks to occupy a place upon its grounds which is denied to another, or to set apart the most favorable ground, as in this case, to one company, and to exclude the others therefrom, would be, in the language of Justice Field, in *Railroad Co. v. Tripp*, 147 Mass. 48; 17 N. E. Rep'r, 95, 'to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public.'

The court disapproves of the majority opinion in *Railroad Co. v. Tripp*, 147 Mass. 35, and declares that to sustain the lease would be to encourage and promote a monopoly "contrary to the spirit of our laws and against that public policy that refuses to encourage or foster monopolies in any kind of business."

To the argument that the company owned the grounds in question and that it had the same right of control over the same that any citizen would have under similar circumstances, the court replied: "When the ground is used in its business of common carrier, and for the purpose of standing or 'setting' of hacks and buses, to solicit the patronage of incoming passengers, then it must use it for the benefit of all, and not for the privilege of one. It could probably refuse, if such refusal was reasonable, in that there was other proper ground for them to stand upon, to permit any hacks or buses to occupy the ground at all; but, if it opens the door to one, all must enter and have equal facilities and privileges one with another."

In *Cravens v. Rodgers*, 101 Mo. 247, the depot in question was situated half a mile from the city of Glasgow. The plaintiff made an approach to the platform under an agreement with the station agent that he should have its exclusive use. The suit was to enjoin a rival hackman from using the approach and platform. The relief was denied. The opinion cites no cases but its grounds appear from the following extract: "If better facilities are afforded one carrier than another by the connecting carrier, competition is discouraged, a monopoly created, and the traveling public are apt to receive a slow, uncomfortable, slovenly, negligent and expensive service. Monopolies are obnoxious to the spirit of our laws, and ought to be discouraged. This is the spirit of our constitutional provision which prohibits 'discrimination in charges, or facilities in transportation \* \* \* between transportation companies and individuals, or in favor of either.' Art. 12, § 28. And in this case we do not think the railroad company could give the plaintiffs the exclusive privilege of approach to nearly one-half of its platform, and that the most desirable and advantageous half, for procuring passengers, and thereby deny it to the defendants, both being there for the same purpose and in the same business of forwarding the railroad's passengers to their places of destination from the point where the railroad company landed them."

The case of *Old Colony R. Co. v. Tripp*, 147 Mass. 85, was an action of tort brought by the railroad company against Tripp for obstructing its station grounds at Brockton. "It had been the practice of the defendant and other owners of job wagons, for several years prior to August 1, 1886, to go to the Brockton station to wait for trains, and to ascertain if the passengers had any baggage or other merchandise for them to carry. The plaintiff, on or about August, 1886, made a contract with the firm of Porter & Sons, of Brockton, to provide means for carrying all baggage and merchandise brought by incoming passengers to such places in the city as they might desire, at their expense. Afterward, the plaintiff, through its station-master at Brockton, and by the order of its general manager and also of its division superintendent, but not by any by-law or vote of its directors or stockholders, notified the defendant and all other owners of job wagons not to come upon the plaintiff's ground at Brockton to solicit baggage or merchandise from incoming passengers, and informed them of the contract made with Porter & Sons, but allowed them, however, to come to the station to deliver such baggage and merchandise, and to take away such as they might have previous orders for. The defendant after receiving this notice continued to come upon the premises, and to solicit baggage and merchandise upon the platform of the station from passengers upon the arrival of trains, and refused to depart therefrom when requested by the plaintiff's agents, though not there to deliver baggage or merchandise for outgoing passengers, or to take it away upon orders received elsewhere." Upon these facts the court directed a verdict for the defendant and reserved the case for the opinion of the supreme court, which ordered judgment on the verdict by a division of four to three.

The majority opinion says: "The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff, or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station where his transit ends. What convenience shall be furnished to passengers within the station for that purpose, is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger which will give him relations with the plaintiff involving the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all, and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such."

The following statute was in force at the time (§ 186 of the Pub. Sts., chap. 112): "Every railroad corporation shall give to all persons or companies rea-

sonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange."

Upon the construction and effect of this statute, the court remarks: "The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depots, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depots for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant as the owner of a job wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them."

The dissenting opinion given by Field, J., and concurred in by Morton, C. J., and Devens, J., proceeds upon the basis of the statute only. It is argued that the statute does not require that the persons or companies to whom the corporation is required to give "reasonable and equal terms, facilities and accommodations," shall own the merchandise which is transported; that as the last clause of the section makes provision for carriers connecting by railway, the preceding clause was intended to make provision for other connecting carriers, and to include public or common carriers, as well as private carriers actually employed by passengers or by the owners or consignees of merchandise, and that, therefore, the statute "was intended to prevent unjust discrimination by a railroad corporation between common carriers connecting with it in any manner, and to require that the railroad corporation should furnish to such carriers reasonable and equal terms, facilities and accommodations, in the use of its depot and other buildings, and grounds for the interchange of traffic."

The English cases bearing upon the question may be prefaced by a reference to the Railway and Canal Traffic Act of 1854 (17 and 18 Vict., chap. 31, § 2), to which they all refer. That statute provides that no railway or canal company "shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or advantage in any respect whatsoever." The act gives a summary remedy for a violation of its provisions by application to the court of common pleas.

The English cases tend to support the Massachusetts case referred to. *Barker v. Midland Ry. Co.*, 18 C. B. 46; 86 E. C. L. R. 45 (1856), was a

suit by an omnibus proprietor, against the company, for preventing him from driving upon their grounds, to set down passengers in his omnibus who were desirous of taking passage upon the defendant's road. The declaration counted upon a universal custom or practice of the company in permitting all who pleased to drive upon its grounds for the purpose aforesaid, and upon the common and general use by the public for that purpose of the drives and grounds of the defendant. The case was disposed of upon demurrer, the court holding that the plaintiff had no remedy. Willes, J., says: "This action is founded upon a supposed duty on the part of the defendants to permit the plaintiff to come upon their land — a duty which is alleged to arise from allowing the public generally to do so. It is not alleged that there has been any dedication of this place to the public; but it is said that it is the duty of a carrier to allow persons who bring passengers or goods to be carried, to enter his premises for the purpose of delivering there the passengers or the goods. It certainly would be somewhat extraordinary if any such right could exist in one to whom the company owes no direct duty, but who merely brings to the station the individuals with whom the company contracts." Jervis, C. J., said: "It is not pretended that the plaintiff was using or seeking to use the railway. What right, then, can he have to say to the company: 'I will use your private property for my profit?' There is no pretense for the action. It has neither principle nor any color of authority to sustain it." Creswell, J., and Crowder, J., expressed similar views. It was said that an action by the persons desiring to be carried would stand upon a different basis. The case does not appear to have been brought under the act of 1854, though there was an attempt to count upon the statute. The statute was held to give no remedy of the character sought and to apply only to persons desiring to use a railway or canal.

The case of *Marriott v. London & S. W. R. Co.*, 1 C. B. (N. S.) 499; 87 E. C. L. R. 498 (1857), was brought under the act of 1854 for the purpose of compelling the defendant company to admit the plaintiff's omnibus into their yard at Kingston station, at all reasonable times, for the purpose of forwarding, receiving and delivering traffic upon and from their railway, in the same manner and to the same extent as other public vehicles of a similar description are admitted into the said yard for that purpose. The facts of the case and the conclusions of the court are thus stated by Cockburn, C. J.: "It seems that the Southwestern Railway Company have entered into an arrangement with one Williams, whereby they admit his omnibus to the door of the station at Kingston for the purpose of letting down and taking up passengers and their baggage, and that they exclude all others. The effect is, that while Williams conveys his passengers coming from Kingston and Norbiton to the door of the booking office, Marriott's passengers, some of whom come from Hampton Wick and Twickenham, being excluded from the station yard, are subjected to the inconvenience of being set down with their luggage in all weathers at the gate, which is about seventy-five feet distant from the door of the booking office. I am of opinion that that is giving an undue and unreasonable preference and advantage to and in favor of Williams, and brings the company within the provisions of the statute in question. I see no sufficient reason why this preference should be given to one omnibus, to the ex-

clusion of another. I can very well understand that a case might arise, where, by reason of the limited extent of their premises, a railway company might be justified in making arrangements for the admission of a certain number only of public vehicles. But nothing of the kind is suggested here. It is said that the arrangement entered into by the company with Williams enables them to secure better accommodation for the public. But, in the first place, the company do not show facts, even as regards the inhabitants of Kingston and its vicinity, whence we can infer that reasonable accommodations would not be secured at least as well without this arrangement, and, in the next place, assuming that it may be a convenient arrangement, as far as the Kingston people are concerned, it does not apply to the rest of the public. Looking at all the circumstances, it does not appear to me that any public benefit is shown, to justify the course pursued by the company. But, on the contrary, I am of opinion, that, as the result of the arrangement, the balance of convenience is against the public, and that this is a case of undue and unreasonable preference within the meaning of the statute, without any corresponding advantage to the public to justify it."

*Beadell v. Eastern Counties Ry. Co.*, 2 C. B. (N. S.) 509; 89 E. C. L. R. 509 (1857), was also a proceeding under the act of 1854. The defendant company had agreed with a cab proprietor, in consideration of his paying them £600 per annum, to allow him the exclusive privilege of plying for hire within their station at Shoreditch. Beadell, another cab proprietor, applied under the act for an injunction to restrain the company from carrying out this arrangement. It appeared that the company allowed all cabs to enter the station for the purpose of setting down passengers at the booking office, but that, having set down the persons they brought to the station, they were compelled to leave the yard. The application was denied. Williams, J., said: "The affidavits upon which this motion is founded do not show that the arrangement with Clark is not highly beneficial to the public as well as to the company. And it has been expressly laid down, in a case which has not been cited — *In re Barrett*, 1 C. B. (N. S.) 423; 87 E. C. L. R. — that the statute in question was passed for the benefit of the public, and not for that of individuals." Cresswell, J., and Willes, J., concurred.

*Painter v. London, etc., Ry. Co.*, 2 C. B. (N. S.) 702; 89 E. C. L. R. 701 (1857), was a similar case, except that the exclusive privilege was granted to a number of fly-proprietors, instead of to one, and except that the affidavits showed that the public were at times subjected to inconvenience on account of the arrangement, in that the privileged proprietors did not always have in attendance sufficient flys to accommodate the passengers arriving by a particular train, in consequence of which some had to wait until those there could return or others be called. The application, however, was denied, Cresswell, J., observing that no "substantial injury or inconvenience to the public" was shown, and Williams, J., that "the complaint must come from those who use the railway."

The case of *West v. London & N. W. Ry. Co.*, L. R., 5 C. P. 623 (1870), has a bearing upon the question. The defendant company, having land adjoining one of their stations, let the whole of it to P., a coal merchant, for the purpose of storing coal brought on defendant's road. P. did not require or use the whole of the land. W., another coal merchant, applied under the act for an

order compelling the company to desist from allowing P. to store coals upon their land, or to grant equal facilities to the plaintiff. The court were equally divided. Boville, C. J. and Keating, J., held that a means of storing coal at the station to which it is sent being a necessary facility for the proper carrying on the coal trade, the company had no right to grant greater facilities to P. than to plaintiff and that they might be restrained from so doing. Smith and Brett, JJ., held that the traffic act only related to facilities in the receiving, forwarding and delivering traffic, that facilities for storing coal after it has been delivered to the consignee do not relate to these, and, therefore, that the matter was not within the jurisdiction of the court. The plaintiff, therefore, failed in his action.

The following cases arising under the same act, though relating to different matters, are referred to: *Palmer v. London, etc., R. Co.*, L. R., 6 C. P. 194; *Perkinson v. Great Western Ry. Co.*, L. R., 6 C. P. 554.

From this review of the authorities in which the question has been directly passed upon, it appears that the cases from Kentucky (the principal case), Montana, Michigan and Missouri go to establish a common-law duty on the part of a railroad company to afford equal facilities at its various stations, to all persons and companies who are engaged or desire to engage, as public or common carriers, in the business of transporting passengers, baggage or merchandise to and from such stations. This doctrine seems in accord with our American institutions and ideas, with the repeated decisions of our courts against monopoly of any kind and with the fact that station grounds are acquired and held by railroad companies by virtue of the sovereign right of eminent domain and on the basis that such acquisition is for the public use, whereby they become, not the absolute and unconditional owners of such property, but in a sense, trustees thereof for the state and the public. They have become possessed of their station grounds on the plea of their necessity in connection with the transportation of persons or property on their roads, and all persons who have business at such stations, in connection with the transportation of persons or property upon the road, ought of right to be admitted to such grounds upon equal terms and afforded equal facilities in their said business.

The principal case is supported by the case of *State, ex rel., etc., v. Missouri Pac. R. Co.* (Neb.), 8 Am. R. R. & Corp. Rep. 82, where it was held that, if a railroad company gives to one person the privilege of erecting an elevator at one of its stations for use in connection with the receiving, handling and shipping of grain, it must afford like facilities to any others who desire to engage in the same business at the same place.

Another case in point is that of the *Indian River Steamboat Co. v. East Coast Trans. Co.* (Fla.), 10 So. Rep'r, 480, in which it was held that a railroad company whose line terminated on a navigable stream where it had docks and piers could not lease the same to one steamboat company, so as to prevent their use by competing lines.

In *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188, it was held that a railroad company could not engage to carry express matter exclusively for one express company, and the same principle was affirmed in *International Express Co. v. Grand Trunk R. Co.*, 81 Me. 92.

In *Jencks v. Coleman*, 2 Sumn. 221, it was held that the proprietor of a



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steamboat line between New York and Providence, who had a contract with a stage line to carry his passengers between Providence and Boston, could exclude from his boats the agents of a rival stage line. To the same effect is *Barnes v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301.

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COLUMBUS WATER CO. V. MAYOR, ETC., OF CITY OF COLUMBUS.

(Supreme Court of Kansas, Feb. 6, 1892.)

1. MUNICIPAL CORPORATIONS. CONTRACT WITH WATER COMPANY FOR A TERM OF YEARS. VALIDITY. A city of the second class granted to a water company the exclusive privilege of furnishing water for public and private use, and contracted with it for a supply of water for fire purposes for twenty-one years. After the company had constructed its plant and had furnished water pursuant to the contract for three years, which the city had paid for, the latter declined to use or pay for the water and repudiated the contract. In a suit by the water company for a *mandamus* to compel the city to levy a tax to pay the water rents due according to the contract it was held, (1) that the questions arising upon the exclusive feature of the contract, were not material to the case, as no other company was claiming in opposition to the exclusive grant; (2) that the contract was not void, even though not authorized for a term of twenty-one years, that having been executed by the company, as far as execution was possible, and no change in conditions appearing, it would be upheld for a reasonable period at least.

2. The tax limitation imposed by paragraph 796, of the General Statutes of 1889, restricting the levy of all city taxes of the current year to four per cent only applies to city taxes for general purposes.

COMMISSIONERS' decision. Original proceedings in *mandamus* by the Columbus Water Company against the mayor and council of the city of Columbus to compel the levy of a tax to pay hydrant rental. Demurrer to the petition overruled.

*John N. Ritter* for plaintiff. *J. D. McCloerty* for defendants.

GREEN, C. This is an original action in *mandamus*, brought by the Columbus Water-Works Company against the city of Columbus, its officers and others, to compel the levy of a tax upon all of the taxable property in the city to pay the hydrant rental upon fifty hydrants for the year 1892, and for an order directing the city clerk to certify the same to the county clerk for the county clerk to place such tax upon the tax rolls of the

county, and for the county treasurer to collect such tax, and pay it over to the city treasurer for the use of the plaintiff.

The same parties were before this court to have the hydrant rental levied for the year 1891. The agreed statement of facts and the proceedings in that case are made a part of the plaintiff's petition in this case. The facts being substantially the same as in that case, reference is made to that case for a full statement of all the facts. See *Water-Works Co. v. City of Columbus*, 46 Kans. 666; 26 Pac. Rep'r, 1046. Since the decision in that case the city of Columbus has notified the water-works company that it would not receive and pay for water, upon the terms heretofore charged, after the 15th day of August, 1891, and gave notice to its fire department to no longer use water from the public hydrants of the company after said date. The water company notified the city that it would continue to furnish water in accordance with the ordinance passed on the 23d day of March, 1887. The city refused to make any provision for the future payment of hydrant rentals. To the petition of the water company the city has interposed a general demurrer.

To reach a decision in this case the defendant has waived the question as to whether the action of *mandamus* is the proper remedy or not. The defendant now insists that a city of the second class cannot create a continuing liability covering, as in this case, a period of twenty-one years, under an exclusive franchise for ninety-nine years. The authority of a city of the second class to make provision to furnish water to its inhabitants and for fire protection has been settled in this state; and a city has the authority to grant a franchise to a person or corporation to establish water works, and is empowered to rent hydrants from such person or corporation. Gen. St., §§ 787, 817, 1401, 1402, 7185-7190; *Wood v. Water Co.*, 33 Kans. 590; 7 Pac. Rep'r, 233; *Water-Works Co. v. City of Burlington*, 43 Kans. 725; 23 Pac. Rep'r, 1068; *Columbus Water Co. v. City of Columbus*, 46 Kans. 666; 26 Pac. Rep'r, 1046; *Manley v. Emlen*, 46 Kans. 656; 27 Pac. Rep'r, 844; Dill. Mun. Corp. (4th ed.), §§ 146, 443, and note to section 568; 15 Am. & Eng. Enc. Law, 1115, 1118, and cases there cited. But it is urged that a contract extending over a period of twenty-one years cannot be enforced, because the officers of the municipality had no authority to bind their successors

for such a length of time; that section 2 of the bill of rights, which provides "that no special privileges or immunities shall ever be granted by the legislature which may not be altered, revoked or repealed by the same body," is an inhibition against any such power. The leading cases upon this question are in conflict as to whether such a contract as the plaintiff sets out in its petition creates a monopoly or not.

The question has frequently arisen between rival light and water companies; sometimes by corporations against cities for the hydrant rentals, when the latter continued to use the water for fire purposes. In this case the city has attempted to cease using the water for any public purpose, and thus relieve itself from all liability on the contract previously entered into to pay a rental of \$3,000 a year for the use of fifty hydrants. The question before us has received the attention of the courts of last resort, both federal and state, of late years, and it is somewhat difficult to reconcile the different decisions. The supreme court of the United States has held "that a gas company, incorporated in 1835, with the exclusive privilege of making and selling gas in New Orleans, its faubourgs and La Fayette, up to April 1, 1875, could, under an act of the legislature, consolidate with another company; and that a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service of the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it." In granting the exclusive franchise to a municipality a state does not part with the police power and duty of protecting the public health, the public morals, and public safety, as one or the other may be affected by the exercise of that franchise by the grantee.

The prohibition in the constitution of the United States against the passage of laws impairing the obligation of contracts applies to the constitution as well as the laws of each state. *New Orleans Gas Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650; 6 Sup. Ct. Rep'r, 252; *Water Co. v. Rivers*, 115 U. S. 674; 6 Sup. Ct. Rep'r, 273; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S.

683; 6 Sup. Ct. Rep'r, 265; St. Tammany Water-Works v. New Orleans Water-Works, 120 U. S. 64; 7 Sup. Ct. Rep'r, 405.

In *Des Moines St. R. Co. v. Des Moines B. G. St. Ry. Co.*, 73 Iowa, 513; 33 N. W. Rep'r, 610, and 35 N. W. Rep'r, 602, the city had had the authority to grant or prohibit the laying down of street-car tracks within its limits. The court held that, although there was no grant of power in express terms authorizing the council to confer an exclusive privilege in the use of streets, under the circumstances of the case, and to procure a better public service, the council could grant a valid exclusive right for the limited period of twenty-five years, such contract being necessary to secure the service which it might not otherwise be able to obtain. The court also decided that the constitutional restriction which declared that no exclusive privileges should be granted, except as provided for in the constitution, did not apply to the grant by a city to a person or company of the exclusive right to build and operate street railways.

In the case of *City of Newport v. Light Co.*, 8 Ky. Law. Rep'r, 22, it was held that when a municipal corporation has the power, express or implied, to contract with others to furnish its inhabitants with the means of obtaining gas at their own expense, it has the power to make a contract granting to a corporation the exclusive right to the use of its streets for that purpose for a term of years. The charter of the city did not, in express terms, give the power to the city to grant an exclusive privilege. The court rested its opinion upon the following grounds: *First*, that the power given the municipality to provide for lighting the city included the power to grant the exclusive right to the use of the streets for that purpose; and, *secondly*, that the Newport Light Company was invested in express terms, by a provision contained in the charter, with the right to furnish any city, town, district or corporation or locality, or any public institution, etc., on such terms as may be agreed upon. The same court has held in a more recent case that where a party contracts with a city for the exclusive right to remove the carcasses of dead animals therefrom, and to use its public streets for this purpose, the law will protect him in his monopoly, and the work cannot be engaged in by others as a general business enterprise. *City of Louisville v. Wible*, 84 Ky. 290; 1 S. W. Rep'r, 605.

In New Jersey, a contract was entered into by Atlantic City with the Atlantic City Water-Works Company for a supply of water, calling for a certain annual payment, without any limit as to time, except that the city might take the water-works at a valuation; and it was held that such a contract was legal and binding on the city. *Water-Works Co. v. Atlantic City*, 48 N. J. Law, 378; 6 Atl. Rep'r, 24. Subsequently it was held by the court of chancery of New Jersey that by an amendment made to the constitution in 1875, which declared that "the legislature shall not pass private, local or special laws granting to any corporation, association or individual any exclusive privileges, immunity or franchise whatever," the exclusive right could not be granted to a water company to use the streets of a city. *Atlantic City Water-Works Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427; 15 Atl. Rep'r, 581

In Tennessee, it has been held that the granting of the privilege by a municipal corporation, by legislative enactment, to a private corporation, for its exclusive use, for a term of years, is not unconstitutional, and having been granted, is, during the term of a contract, beyond the reach of subsequent legislative interference. It was decided that, notwithstanding the constitution forbids perpetuities and monopolies, an exclusive privilege to a city to erect water-works was not a monopoly, and that granting an exclusive privilege for a term of years to a private corporation did not render it a monopoly. *City of Memphis v. Water Co.*, 5 Heisk. 495.

The supreme court of Wisconsin has decided that the legislature could confer upon a private corporation the exclusive right to manufacture and sell gas, and to erect works and lay pipes therefor within the limits of the corporation. *State v. Gas-Light Co.*, 29 Wis. 454. There seemed to be no constitutional limitation when this case was decided, and the court expressly held that the legislature might create a monopoly.

The supreme court of Connecticut in the case of *Citizens' Water Co. of Bridgeport v. Bridgeport Hydraulic Co.*, 55 Conn. 1; 10 Atl. Rep'r, 170, where the city council of Bridgeport had accepted a proposition from a party to supply the city with water, and granted him, with the power of assignment, the exclusive right to lay pipes in the streets, so long as a full supply of pure

water should be furnished, and the Bridgeport Hydraulic Company acquired such right by assignment, and expended large sums of money in establishing water-works, held, that so long as this company supplied the city with an abundance of water, the legislature had no power to give another corporation the right to lay pipes in the streets of the city for the purpose of supplying the city with water. The court said "that it was the duty of the court to preserve contracts inviolate, rather than to destroy monopolies. The legislature having in effect authorized the city to make a contract which it desired to make, will not — cannot — now relieve it. Although the state is no party to, and has no interest whatever in, the subject-matter of a contract, if it volunteers to invest a creature of its own, otherwise powerless, with power to make it, the legislature is thereafter concluded in reference to it. It is a lawful contract between two natural persons of full legal capacity, sacred from any interference other than judicial construction."

The court of appeals of New York has decided squarely against this doctrine. Under a law passed in 1865, Middletown was authorized to contract with a gas company for street lighting, but was given no specific power to make a continuing contract. The town made a contract for five years. In 1866 the law of 1865 was unconditionally repealed. The gas company brought an action to recover for gas furnished in 1870, under a contract made with the board of town auditors in 1865. The court said: "Prior to the passage of the act of 1865 the town had no power to cause any of its streets to be lighted with gas or in any other way. By that act such power was conferred upon the defendant. For what time? The learned counsel for the appellant insists for the term of five years, at least, for which the contract was entered into by the plaintiff with the town auditors to furnish gas; and that during that time the legislature had no power to relieve the town, or any part of it from the expense of lighting all the streets embraced in the contract, whatever the necessity for such relief might be. If the board of town auditors could deprive the legislature of this power for five years, by entering into a contract with the plaintiff for that time, it might for one hundred years, by contracting for that period. I think it clear that no such power was

conferred by the act upon the town auditors." *Gas Co. v. Middletown*, 59 N. Y. 228.

In *City of Chicago v. Rumpff*, 45 Ill. 90, it was held that municipal corporations were created solely for the public good, and to that end the corporate authorities were held to a strict exercise of the franchises conferred; that a right to do all slaughtering of animals within the city of Chicago for a specified period was void, because creating a monopoly.

In *Gale v. Kalamazoo*, 23 Mich. 344, where a party had been given the right by contract with the municipality to build and control a market-house for the period of ten years, the contract was held void, because it created a monopoly. Judge Cooley said in this case: "It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic; and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights could long exist without its recognition."

The same question was considered in the case of *State v. Coke Co.*, 18 Ohio St. 262, where the charter of the city conferred on the gas company power "to manufacture and sell gas, to lay pipes, etc., provided the consent of the city council be obtained for that purpose." Under the power given to the city council of Cincinnati "to cause said city, or any part thereof, to be lighted with oil or gas, and to levy a tax for that purpose," it contracted to invest the defendant with full power and exclusive privilege of using the streets, etc., for the purpose of lighting the city for the period of twenty-five years, and thereafter until the city should purchase the gas-works. It was held that, while there was no doubt about the city's authority to make the contract for gas-light, there was no necessity for making such right exclusive.

In *Logan v. Pyne*, 43 Iowa, 524, the city of Dubuque had granted to the plaintiff the exclusive privilege and franchise of

running omnibuses to carry passengers upon the streets of the city from the 4th day of January, 1872, to the 1st day of January, 1877. The plaintiffs alleged that they had complied with the ordinance granting them such right, and charged the defendant with violating their right by running omnibuses upon the streets of the city, and that he had received large sums of money which the plaintiffs were entitled to under the ordinance granting them such right. The court held: "The powers of municipal corporations are limited to the express terms of the grant, and will not be extended by inference. A municipal corporation can confer exclusive privileges for the prosecution of business only under an express grant of power from the legislature. Monopolies being prejudicial to the public welfare, the courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy."

In the case of *City of Brenham v. Water-Works Co.* (Tex. Sup.), 4 S. W. Rep'r, 143, a city ordinance granted to the water company the right and privilege for the term of twenty-five years from the adoption of the ordinance of supplying the city of Brenham and its inhabitants with water for domestic and other purposes, and for the extinguishment of fires. By the ordinance the city agreed to pay to the water company \$3,000 per annum during the term of twenty-five years, as hydrant rental. The charter gave the city power to provide the city with water for the convenience of the inhabitants and the extinguishment of fires. A general law authorized any city in which a water company was organized to contract with it for supplying the city with water. It was held that, while the several laws, taken together, undoubtedly authorized the city to make some contract for supplying itself with water, yet they did not confer on the city express power to make a contract granting the water company the exclusive right to supply the city and inhabitants with water for twenty-five years at a fixed rate per annum; and, as no such power was necessary to the proper exercise of the power expressly granted, it could not be implied; and that such a contract was unauthorized and invalid. In this case the court said: "We do not wish to be understood to hold that a municipal corporation has no power, in any event, to contract for such things as are consumed in their daily use, for a period longer than the



official term of the officers who make the contract; but we do intend to be understood to hold that such corporations have no power to make contracts continuous in character, in reference to such things, or any others, by which they will be, in effect, precluded from exercising, from time to time, any power, legislative in character, conferred upon them by law."

In *Davenport v. Kleinschmidt*, 6 Mont. 502; 13 Pac. Rep'r, 249, it was held that the grant by a city council of the exclusive right of selling to the city of Helena all the water required by it for sewerage and fire purposes for the period of twenty-five years, at a minimum rate fixed in the contract, was a monopoly; and this, though the grant does not prevent other people from selling water to private citizens; that a city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature. In delivering the opinion in this case, among other things, Mr. Justice McCleary said: "Then, the power to provide the city with water, by making a proper contract with some person to erect water-works, and sell water to the city, being conceded, the next question that presents itself is as to the power of the city to make this particular contract. Is the present such a contract as to be beyond the power of the city council to enter into, so as to bind the municipal corporation? Does this contract create a monopoly? For, if it does, it goes beyond the power of a city council. Monopolies may be created; but they must be called into being by the sovereign power alone. A city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature. Monopolies are contrary to the genius of a free government, and ought not to be encouraged by the people or countenanced by the courts, except when expressly authorized by positive law. In many of the state constitutions an announcement of this principle is already explicitly declared. A monopoly is defined by the best and oldest law-writers to be "an institution or allowance by a grant from the sovereign power of a state, by commission, letters-patent or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working or using any thing is given." 2 Bouv. Law. Dict., p. 194; 5 Bac. Abr. "S;" 3 Co. Inst. 181. It has also been well defined in a late

work as follows: "The popular meaning of 'monopoly' at the present day seems to be the sole power (or a power largely in excess of that possessed by others) of dealing in some particular commodity, or at some particular place or market, or of carrying on some particular business." 2 Rap. & L. Law Dict. 834, 835.

In *Minturn v. Larue*, 23 How. 435, it was held that a charter authorizing the city of Oakland to establish and regulate ferries, or to authorize the construction of the same, gave no power to the city to grant an exclusive privilege. In delivering the opinion of the court, Mr. Justice Nelson said: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

In the case of *Jackson Co. Horse R. Co. v. Rapid Transit Co.*, 24 Fed. Rep'r, 306, Judge Brewer, now of the supreme bench, held that, in the absence of express authority in its charter, the city of Kansas had no power to grant to a street-railway company the sole right for the space of twenty-one years to construct, maintain and operate a railway over and along the streets of such city. In deciding that case the judge observed that he had been charged with the duty of preparing the opinion of this court in the case of *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 31 Kans. 660; 3 Pac. Rep'r, 284, where the right of a street railway to occupy the streets of the city was challenged; that the opinion there formed by him had not been changed by the able and exhaustive argument of the learned counsel for the complainant. There, as here, the city was given by its charter general supervision and control of the streets of the city, but was not given, in express terms, power to authorize street railroads. In other words, the power vested in the city, and the extent to which that power had been exercised by the city, are alike. The court did not decide the precise question here presented, but expressly declined to give any opinion thereon, holding that, under the grant of general supervision and control of the streets, the city had power to permit the occupation of its streets by a street rail-

road. But, obviously, there was opened for inquiry the broad question of the power of a city under such a general grant, and that question was made, as I have stated heretofore, the subject of full and careful investigation.

In *Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep'r, 529, it was held that authority given "to cause the streets of a city to be lighted, and to make reasonable regulations" with reference thereto, did not empower the city government to grant to one company the exclusive right to furnish gas for thirty years; that the exclusive right to light a city with gas for thirty years was not legally "impaired" by a subsequent contract with another company to light the streets of the city with electricity. This case was decided by Judge Brown, now of the supreme court of the United States, and the authorities were fully reviewed, and the principles involved were elaborately discussed.

In the case of *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. Rep'r, 328, Judge Brewer said: "This rule of construction against the grantee, which applies in all legislative grants, obtains with the greater force in a case like the one at bar, where the grant claimed is not merely the right to do something, but of a right to exclude all of the rest of the public from doing that thing. He who says that the state has given him a franchise—a right to do that which without that franchise he could not do—will be compelled to show that the franchise—the right claimed—is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise—the right to do—but also the right to exclude all others of the public from exercising the same right, and the state, as the representative of the public, from according the same right to another." See, also, *Proprietors v. Wheeley*, 2 Barn. & Adol. 793; *Charles River Bridge v. Warren Bridge*, 11 Pet. 422; *Perrine v. Canal Co.*, 9 How. 172; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. Rep'r, 659.

The supreme court of Pennsylvania has stated the rule with reference to the grant of franchise in *Pennsylvania R. Co. v. Canal Comrs.*, 21 Penn. St. 22: "When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it

is so easy to say so that we will never believe it to be meant when it is not said. In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation."

Judge Drummond said, in the case of *Garrison v. City of Chicago*, 7 Biss. 488: "The officers of the city—the members of the council—are trustees of the public. They are clothed with authority to legislate upon public interests. There can be no doubt that the right to regulate the lighting of the streets and to furnish means for the same by taxation is in its nature legislative power. It concerns the whole public of the city. The effect of the contract in question by the city authorities in October, 1869, if valid, was to bind their successors for ten years as to those matters of legislation. If it be conceded that the powers existed, as claimed, then it practically follows that at the end of the term, in 1879, a contract may be made by their successors without limit, and which may bind the public indefinitely. I am unwilling to sanction a principle which, in a case like this, would lead to such results. The safer rule is to hold the officers of a municipality to a rigid accountability in the discharge of their trust. In all cases of contracts to run for years, the authority to make them should be clear, because they involve pecuniary liability, and it is a tax upon future property-owners of the city. To sustain the contract between the city and gas company in this case would encourage the making of such contracts in the future. It would place it in the power of companies, whose interests were to be affected by them, to multiply them, and to continue them when the public interest demanded they should cease. To condemn it is to prevent, so far as it may tend to produce that result, the use of influences which look to private, rather than to public, profit. It is better that all parties should understand there is a limit to the power of municipal bodies in such cases."

The supreme court of Illinois passed upon a question similar to the one now under consideration in the case of *City of East St. Louis v. Coke Co.*, 98 Ill. 415, where it was held: "It does not appear in the case, nor is it claimed, that the city has exercised its powers by ordinance or otherwise, or manifested a wish to provide differently than as by the contract. So far as the contract has been executed it has been as one for the furnishing of the lights

during the pleasure of the city. Courts should not destroy the contract made by parties further than some good reason requires. Such an objection is made to this contract. That it interferes with the exercise of the legislative or governmental power of the city over the subject does not require that the contract should be held void, but only voidable, so far as it is executory." To the same effect is *Coke Co. v. City of Decatur*, 24 Ill. App. 544; *Power Co. v. City of Carlyle*, 31 Ill. App. 325; *Bradley v. Ballard*, 55 Ill. 413.

It will be seen by this extended review of the authorities, both state and federal, that there are three classes of decisions upon this important question. The supreme court of the United States holds that where there has been an express legislative grant, upon a condition of performance, in consideration of such performance and public service, after performance by the grantee it becomes a contract which is protected by the constitution of the United States. A number of states, notably Tennessee and Wisconsin, have said that such a grant is not a monopoly, and is fully protected, and held as inviolable as a contract between private parties or private corporations; while other states and some federal courts have held that municipal corporations cannot make contracts beyond the legislative life of its mayor and governing body. We are not ready to indorse the latter class of decisions, or go to the full extent of the former. We are not inclined to the opinion that the question that the city has attempted to grant an exclusive franchise is necessarily material in this case, under its present *status*. It is not a question between contending water companies, as to which shall have certain privileges. No company is offering to furnish a better supply of water upon more reasonable terms. Hence we do not think the franchise should now be held void by reason of its exclusiveness. That question should not be decided until it is before us in a case in which it would be proper for us to pass upon it. Again, if we are to follow former precedents, much of the argument of counsel for the city is lost wherein he contends that the franchise claimed is in direct conflict with section 2 of the bill of rights.

This court has said, speaking through Mr. Justice Brewer, that the words "no special privileges or immunities" refer to priv-

ileges or immunities of a political nature. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, supra.

It is conceded that the plaintiff has only been furnishing water to the city of Columbus for a period of a little more than four years, the works having been tested and accepted on the 28th day of December, 1887. So far as the plaintiff can make it, the contract is an executed one; and during the period of its existence, while the city used the hydrants and paid the rental, it became an executed contract so far as the city was concerned. Now, the city having, by its contract and permission, invited the expenditure of a large sum of money by the plaintiff in erecting its works, in order to give the city such fire protection as it had agreed to pay for in the manner indicated in the ordinance, should not the water company be given a reasonable time in which it might have the benefits of a contract which had been agreed to and recognized? Or shall we say that, because there was no express authority to make the contract for the period of twenty-one years, it is therefore void? To hold to the latter proposition, when the parties cannot be placed in the same condition they were in before the contract was executed, would be a violation of the plainest rules of good faith. The plaintiff alleges that in pursuance of the contract it has expended large sums of money in constructing its water plant; that bonds to the amount of \$60,000 have been issued, which are secured by a mortgage upon said plant; that the rentals from private consumers of water and other resources are not sufficient to pay the interest on the bonds as the coupons mature, and it has no means of paying the interest except from the rentals which the city had contracted to pay; that the city has no other supply for water, and no other franchise has been granted; and that the city and its inhabitants are without protection from fire, except as provided by the plaintiff; that the city is practically the same size it was in 1887, and the taxable property is substantially the same now as then. As the case stands here upon demurrer, of course we assume these facts to be true.

In *Hitchcock v. Galveston*, 96 U. S. 341, the city council had contracted with the plaintiffs to build certain sidewalks, to be paid for by the city in bonds. The work was partly performed, but the city council stopped the work and prevented its completion. An action was brought for a breach of the contract. It was urged

that the city had no power to make such a contract, and it had no authority to issue the bonds of the city. The court said: "It is enough for the plaintiffs that the city council have the power to enter into a contract for the improvement of the sidewalks; that such contract was made with them; that under it they have proceeded to furnish material and do work, as well as to assume liabilities; that the city has received, and now enjoys the benefit of what they have furnished; that for these things the city promised to pay; and, after receiving the benefit of the contract, broke it. It matters not that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds, because their issue is *ultra vires*, it would sanction rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful." The court cites in support of the decision the case of *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, where the court held that "although there may be a defect of power in a corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promises induced a party, relying on the promises and in execution of the contract, to expend money, and perform his part of the contract, the corporation is liable on the contract.

We do not wish to be understood as upholding the contract upon which the plaintiff relies for any particular period of time, but we are not prepared to say that it is void. Neither would we apply the rule with the same strictness to municipal corporations that should govern private corporations organized for gain. Courts should be governed by the conditions and circumstances surrounding municipalities, and regard them as branches of the sovereign government. When improved methods are offered, which will give to the city better facilities in the way of water, lights and travel, or in any other manner give to its inhabitants increased safety and protection, the governing power of the city should be free to act; but until such time comes courts should not set aside contracts which have been, in part at least, executed, unless for some good cause. The circumstances surrounding each particular case will have to largely govern, and no fixed and determinate rule can be established. The facts, as presented by the plead-

ings, are not sufficient, in our opinion, to authorize us to say that the contract entered into between the city and the water-works company is *ultra vires*, and should not, therefore, be enforced.

To show the limit to which the supreme court of the United States has gone in upholding franchises of a similar nature to the one under consideration, we quote the language of Mr. Justice Davis, in *Binghamton Bridge*, 3 Wall. 51: "The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the government to provide for them; and, as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark with your time, money and skill in an enterprise which will accommodate the public necessities, we will grant you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money and the employment of your time and skill.' Such a grant is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it." Mr. Justice Valentine, in the case of *Brown v. City of Atchison*, 39 Kans. 54; 17 Pac. Rep'r, 465, speaking for this court, after a review of the authorities upon the question of corporate power, deduced the following principle: "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it or to enter into it, but the contract is not immoral, inequitable or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity toward the other party by either rescinding the contract and placing the other party *in statu quo*, or by accounting to the other party for all



benefits received, for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit." As this court has already decided, the city of Columbus had the authority to make a contract for the supply of water for protection against fire; and, as such contract has been entered into and carried out in part, we are not prepared to say that it is void because the authorities of the city did not possess the power to make a contract for the period of twenty-one years. If the contract had only been executory, and no rights had accrued, we might hold otherwise. As to the ratification of irregular contracts, see authorities cited in *Water-Works Co. v. City of Columbus*, 46 Kana. 677; 26 Pac. Rep'r, 1046.

It is forcefully urged by counsel for the city that under paragraph 796 of the General Statutes of 1889 the contract with the water company is void; that a city of the second class cannot create a void liability which requires a tax to be levied in excess of four per cent. The paragraph reads: "At no time shall the levy of all the city taxes of the current year for general purposes, exclusive of school taxes, exceed four per cent of the taxable property of the city, as shown by the assessment-books of the preceding year." It appears from the pleadings in the former case that the city tax for the year 1890 was twenty-seven and one-half mills. This does not include the state and county tax, and we think the limitation only applies, as stated, to the city taxes of the current year for general purposes. Adopting this construction of the law, the position of counsel is not tenable. It is recommended that the demurrer to the petition be overruled.\*

**PER CURIAM.** It is so ordered, Valentine and Johnston, JJ., concurring.

**HORTON, C. J.** I concur in the judgment recommended to be entered by this court, but not in all stated in the opinion.

**1. Municipal corporations—time contracts for water and light—exclusive rights.**—The legislature may grant to individuals or corporations the exclusive right of supplying water or gas to the inhabitants of towns and cities including the exclusive right to use the streets for that purpose, and it may authorize such grants by municipal corporations. *New Orleans Gas Co. v.*

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\* Reported in 26 Pac. Rep'r, 1032.

Louisiana Light Co., 115 U. S. 650; New Orleans Water-Works Co. v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 688; St. Tammany Water-Works v. New Orleans Water-Works, 120 U. S. 64; Slaughter-House Cases, 16 Wall. 86; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1; Atlantic City Water-Works v. Atlantic City, 39 N. J. Eq. 367; Memphis v. Memphis Water Co., 5 Heisk. 495; State v. Milwaukee Gas-Light Co., 29 Wis. 454. But a municipal corporation cannot make such an exclusive grant without express authority to do so; that is, the power must be given in *express* words or it must be necessarily implied from the powers given. Greenville Water-Works Co. v. City of Greenville (Ala.), 7 So. Rep'r, 409; Norwich Gas-Light Co. v. Norwich City Gas Co., 25 Conn. 19; Citizens' Gas & Min. Co. v. Elwood, 114 Ind. 832; Crowder v. Town of Sullivan (Ind.), 4 Am. R. R. & Corp. Rep. 586; Lang v. Duluth (Minn.), 51 N. W. Rep'r, 913; Syracuse Water Co. v. Syracuse, 116 N. Y. 167; Lehigh Water Co.'s Appeal, 103 Penn. St. 515; State, ex rel., etc., v. Cincinnati Gas-Light Co., 18 Ohio St. 262; Brenham v. Brenham Water Co., 67 Tex. 543; Gas Co. v. Parkersburg, 30 W. Va. 435; Saginaw Gas-Light Co. v. Saginaw, 28 Fed. Rep'r, 529; Grand Rapids El. L. & P. Co. v. Grand Rapids Edison El. L. & P. Co., 33 Fed. Rep'r, 659. But where a light company was authorized by its charter "to furnish any city, town, district, corporation or locality, or any public institution, manufacturing establishment or private premises, with gas or other light *for such time and on such terms as may be agreed on by the parties*," it was held to authorize a city to contract with the company for light for twenty-five years and to give the company the exclusive use of its streets for laying down pipes, etc. City of Newport v. Newport Light Co., 84 Ky. 166.

This rule of strict construction is further illustrated by cases relating to ferry franchises and railroad privileges in streets, among which may be cited the following: East Hartford v. Bridge Co., 10 How. 511; Minturn v. Larue, 23 How. 435; McEwen v. Taylor, 4 G. Greene, 532; Wright v. Nagle, 101 U. S. 796; Davis v. New York, 14 N. Y. 506; Milhau v. Sharp, 27 N. Y. 611; Railroad Co. v. Smith, 29 Ohio St. 291; Railroad Co. v. Railroad Co., 10 Wall. 83; Railroad Co. v. Railroad Co., 79 Ala. 465.

Any grant of the privilege of furnishing water or gas will not be deemed to be exclusive unless so expressed. Id. "Public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no further than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the state in imparting to its citizens or corporations powers and privileges of public character. And, therefore, except so far as they are by the terms of the grant made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be, to those taken by the prior grantee. Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 178. See, also, State, ex rel., etc., v. City of Hamilton (Ohio), 2 Am. R. R. & Corp. Rep. 60.

Not only will such grants be strictly construed against the claim of exclusiveness, but if expressly exclusive, the exclusive feature will be limited to the precise scope of the grant. Thus it has been held that the grant of an exclusive privilege of lighting with gas is not infringed by the grant of a privilege to light with electricity in the same territory. Gas Co. v. Parkersburg,

80 W. Va. 435. So an exclusive right to supply a city with water from "Three Mile creek" is not interfered with by a grant to supply water derived from other sources. *Stein v. Bienville Water-Supply Co.*, 84 Fed. Rep'r, 145.

In *Emerson v. Commonwealth*, 108 Penn. St. 111, it appeared that the Fuel Gas Company was organized under act of April 29, 1874, of Pennsylvania, "to supply heat to the public from gas within the city of Pittsburgh." A few days afterward the Penn Fuel Company was organized under the same statute "for the purpose of supplying heat to the public within the city of Pittsburgh by means of natural gas conveyed from such adjoining counties as may be convenient." The act in question provided that the franchises and privileges conferred by the act should be exclusive within the district covered by the charter, and that no other company should be incorporated for the same purpose, until the company first incorporated should have from its earnings realized and divided among its stockholders a dividend equal to eight per cent per annum for five years upon its capital stock. Upon a *quo warranto* to question the authority of the second company to exercise its franchises within the territory designated, it was held that the franchise of the first company was to furnish heat produced from any kind of gas within the city of Pittsburgh, but that it had no franchise to bring natural gas from without the city; that the franchise of the second company was to furnish heat from natural gas obtained from without the city; that the franchises were not identical or hostile, and that the second company could exercise its franchises without interfering with the exclusive rights of the first. "It is scarcely necessary to say," says the court, "that exclusive privileges which affect great public interests must be most strictly construed against the grantee and in the interest of the public. We do not decide that they are necessarily illegal. The case does not require it. But we are very clear that these two franchises are not identical, and therefore the one cannot operate to the exclusion of the other." P. 124.

In the recent case of *Long v. City of Duluth* (Minn., April 8, 1892), 51 N. W. Rep'r, 918, it appeared that the city of Duluth was authorized "to provide for and control the erection of water-works by said village for the supply of water to said village and its inhabitants, and to grant the right to one or more private companies or corporations to erect water-works to supply said village and the inhabitants thereof, with water, and to authorize and empower such company or corporation to lay water-pipes and mains into, through and under the streets, avenues, alleys and public grounds of said village and city of Duluth, and, when necessary for properly carrying out the purpose of said company or corporation, to appropriate private property in the village or city of Duluth to the use of said company or corporation, \* \* \* and to control the erection and operation of such water-works, and the laying of such pipes and mains, in accordance with such terms and conditions as may be agreed upon with said company or corporation." Acting under this authority, the city made a contract with the Duluth Gas and Water Company which in effect gave the company the exclusive right to furnish water for public and private use within the city for a period of thirty years, and a like privilege as to gas for a less period. The city expressly stipulated not to grant like privileges to any other person within the period, nor to engage in the business itself. The suit was to enjoin the city from establishing water-works of its own in violation of the agreement. The court held that the contract was unauthorized, and that the

city was not precluded from establishing water-works on its own account. After reviewing the authorities the court say: "An examination of the authorities here cited, and of others of like import, readily leads to the conclusion that the charter powers of the village of Duluth were not such as to enable it to confer upon the water company the exclusive right to supply the municipality with water for the period of thirty years. Such power was certainly not expressly conferred. Nor was it necessarily involved in the authority given to contract for a water supply, and to confer the right upon one or more private corporations to establish water-works and a supply system. Such general language falls short of expressing an intention to confer the power to grant an exclusive franchise which shall in effect, bind and restrict, not only the village, but the state, in the exercise of its governmental functions, for thirty, sixty or one hundred years, or forever. It may be said that the power to contract would be useless, unless the privilege conferred may be made exclusive; for otherwise private corporations or persons would not engage in an undertaking involving the necessity for very large expenditures of capital in works which might be rendered unprofitable, if not valueless, by the subsequent action of the municipal or state government. The argument is not without force. The cases cited above, and others, show that it has often been advanced in support of claims of exclusive privileges, but it has rarely, if ever, prevailed. It suggests considerations of policy which may influence the legislatures to grant, or to authorize the granting of exclusive privileges; but the principles in accordance with which legislative grants of this kind are to be construed seem to be so clearly established that, generally, not much weight can be given to such an argument in determining the effect of particular legislative action."

While the authorities are substantially uniform that a city cannot grant an exclusive right to furnish water or gas, unless expressly authorized to do so, there is some conflict on the question whether, under a general power to contract for light or water, it can make a valid contract for a term of years. The following are the cases on the subject: *Greenville Water-Works Co. v. Town of Greenville* (Ala.), 7 So. Rep'r, 409; *East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415; *Carlyle Water, etc., Co. v. City of Carlyle*, 31 Ill. App. 325; *Decatur Gas-Light Co. v. City of Decatur*, 24 Ill. App. 544; *Indianapolis v. Indianapolis Gas L. & C. Co.*, 66 Ind. 396; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332; *Crowder v. Town of Sullivan* (Ind.), 4 Am. R. R. & Corp. Rep. 586; *Grant v. City of Davenport*, 36 Iowa, 396; *Atlantic City-Water-Works v. Atlantic City*, 48 N. J. Law, 378; *Richmond Co. Gas-Light Co. v. Middletown*, 59 N. Y. 228; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *State, ex rel., v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 262; *Brenham v. Brenham Water Co.*, 67 Tex. 542; *Garrison v. Chicago*, 7 Biss. 480; *Saginaw Gas-Light Co. v. Saginaw*, 38 Fed. Rep'r, 529.

### MCARTHUR V. TIMES PRINTING CO.

(Supreme Court of Minnesota, Feb. 5, 1892.)

1. CORPORATIONS. ADOPTING CONTRACT MADE BY PROMOTERS. While a corporation is not bound by engagements made on its behalf by its promoters

before its organization, it may, after it is organized, make such engagements its contracts by adopting them as its own; and this it may do in the same manner as it might make similar original contracts. *Battelle v. Pavement Co.*, 33 N. W. Rep'r, 327; 87 Minn. 89, followed.

2. ADOPTION DOES NOT RELATE BACK TO MAKING OF CONTRACT. The act of the corporation in adopting such engagements is not a ratification, which relates back to the date of the making of the contract by the promoter, but is, in legal effect, the making of a contract as of the date of the adoption.

3. STATUTE OF FRAUDS. PERFORMANCE WITHIN A YEAR. TIME COMPUTED FROM DATE OF ADOPTION BY CORPORATION. Hence, although the contract made in behalf of the contemplated corporation was, by its terms, not to be performed within one year from the date of the making thereof by the promoter, it is not within the statute of frauds if it be performed within one year from the date of its adoption by the corporation after its organization.

**A**PPEAL from district court, Hennepin county, Canty, judge. Action by D. A. McArthur against the Times Printing Company to recover damages for a breach of contract. Judgment for plaintiff. Defendant appeals. Affirmed.

*George F. Edwards* for appellant. *F. B. Wright* for respondent.

MITCHELL, J. The complaint alleges that about October 1, 1889, the defendant contracted with plaintiff for his services as advertising solicitor for one year; that in April, 1890, it discharged him, in violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defenses: (1) That plaintiff's employment was not for any stated time, but only from week to week; (2) that he was discharged, for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks and others were engaged as promoters in procuring the organization of the defendant company to publish a newspaper; that, about September 12, Nimocks, as such promoter, made a contract with plaintiff, in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1—the date at which it was expected that the company would be organized; that the corporation was not, in fact, organized until October 16, but that the publication of the paper was commenced by the promoters October 1, at which date plaintiff, in pursuance of his arrangement with

Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company he continued in its employment in the same capacity until discharged, the following April; that defendant's board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors and officers of the corporation knew of this contract at the time of its organization, or were informed of it soon afterward, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. *Abbott v. Hapgood*, 150 Mass. 248; 22 N. E. Rep'r, 907; *Beach Corp.*, § 198. This, however, seems to be more a question of name than of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason, as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts. And this it may do precisely as it might make similar original contracts, formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not requisite that such adoption or acceptance be express, but it may be inferred from acts or acquiescence on part of the corporation, or its authorized agents, as any similar original contract might be shown. *Battelle v. Pavement Co.*, 37 Minn. 89; 33 N. W. Rep'r, 327. See, also, *Mor. Corp.*, § 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is

very clear ; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because "by its terms, not to be performed within one year from the making thereof," which counsel assumes to be September 12 — the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification, which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contract made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. In *re Empress Eng. Co.*, 16 Ch. Div. 128; *Melhado v. Railroad Co.*, L. R., 9 C. P. 505; *Kelner v. Baxter*, L. R., 2 C. P. 185. What is called "adoption," in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by a corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of a variance between it and the complaint. The

assignments of error are very numerous, but what has been already said covers all that are entitled to any special notice. Order affirmed.\*

# CORPORATIONS — CONTRACTS OF PROMOTERS — ADOPTION AND RATIFICATION.

1. Corporation not liable upon contracts made before its organization in its name or behalf without some act of its own adopting or assenting thereto. — A corporation, though impossible without members, is nevertheless a distinct and separate entity. Like a natural person it cannot be bound by a contract without its consent, express or implied. It follows that a contract made before it came into existence, by those interested in its formation, and intended to bind or affect it, is in no way binding upon the corporation, unless it ratifies or adopts the same or takes the benefit thereof, or unless such contract is made obligatory by its organic law. To this extent the authorities are uniform. *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; *Little Rock, etc., R. Co. v. Perry*, 37 Ark. 164; *Perry v. Little Rock, etc., R. Co.*, 44 Ark. 383; *Morrison v. Gold Mountain Gold Min. Co.*, 52 Cal. 306; *Hawkins v. Mansfield Gold Min. Co.*, 52 Cal. 513; *New York, etc., R. Co. v. Ketchum*, 27 Conn. 170; *Stanton v. New York, etc., R. Co.*, 59 Conn. 272; *Rockford, etc., R. Co. v. Sage*, 65 Ill. 328; *Safety Deposit Life Ins. Co. v. Smith*, 65 Ill. 309; *Stowe v. Flagg*, 72 Ill. 397; *Gent v. Manufacturers', etc., Ins. Co.*, 107 Ill. 652; *Carey v. Des Moines Co-op. Coal & Min. Co.*, 81 Iowa, 674; 47 N. W. Rep'r, 832; *Marchand v. Loan & Pledge Assn.*, 26 La. Ann. 888; *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59; *Frost v. Inhabitants of Belmont*, 6 Allen, 152; *Abbott v. Hapgood*, 150 Mass. 248; *Penn. Match Co. v. Hapgood*, 141 Mass. 145; *Carmody v. Powers*, 60 Mich. 26; *Battelle v. N. W. Pavement Co.*, 37 Minn. 89; *Munson v. Syracuse, etc., R. Co.*, 103 N. Y. 58; *Wilbur v. New York Electric, etc., Co.*, 58 N. Y. Super. 539; *Tift v. Quaker City Nat. Bank*, 141 Penn. St. 550; 21 Atl. Rep'r, 660; *Hall v. Vt. & Mass. R. Co.*, 28 Vt. 401; *Buffington v. Bardon (Wis.)*, 50 N. W. Rep'r, 773; *Greenhalgh v. Manchester & B. R. Co.*, 9 Simons, 416; *Gunn v. London, etc., Ins. Co.*, 12 C. B. (N. S.) 694; 104 E. C. L. R. 694; *Williams v. St. George Harbor Co.*, 2 De Gex & J. 548; *Caledonia, etc., R. Co. v. Magistrates*, 2 Macq. 891; *Payne v. New South Wales, etc., Co.*, 10 Exch. 283; *Hutchinson v. Surrey Consumers' Gas-Light, etc., Co.*, 11 C. B. 639; *Preston v. Liverpool, etc., R. Co.*, 5 H. L. Cas. 605; 73 E. C. L. R. 689; *Melhado v. Porto Alegre, etc., R. Co.*, L. R., 9 C. P. 503; *Kelner v. Baxter*, L. R., 3 C. P. 174; *In re Northumberland Ave. Hotel Co.*, L. R., 38 Ch. Div. 16; *In re Empress Engineering Co.*, L. R., 16 Ch. Div. 125.

The principle is general and applies to contracts of every description, so that it is unnecessary to specify the particular contracts and circumstances involved in the cases cited. Some apparent exceptions may be found in the earlier English cases. See *Edwards v. Grand Junction R. Co.*, 1 Myl. & C. 650; *Stanley v. Chester & Birkenhead R. Co.*, 8 Myl. & C. 773. But the later cases, as we shall hereafter show, go still further than the general rule

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\* Reported in 51 N. W. Rep'r, 216.



stated, and hold, not only that such contracts are not binding upon the corporation, but that it cannot even adopt or ratify them. See especially *In re Empress Engineering Co.*, L. R., 16 Ch. Div. 125; *In re Northumberland Ave. Hotel Co.*, L. R., 88 Ch. Div. 16.

The American cases which come nearest an exception are *Low v. Conn. & Passumpsic R. Co.*, 45 N. H. 370; S. C., 46 N. H. 284, and *Hall v. Vt. & Mass. R. Co.*, 28 Vt. 401, in which it was held that a corporation was liable for services rendered, after its charter had been granted, in procuring subscriptions to its stock and perfecting its corporate organization. In the New Hampshire case there was an agreement between the plaintiff and the promoters, that the plaintiff should be compensated for his services, and the decision is put upon the ground that the corporation, by accepting the subscriptions procured by the plaintiff or through his efforts, with knowledge of the agreement, thereby ratified or adopted the same. It is made essential to a recovery, that there should have been an understanding or agreement with the promoters that the plaintiff should be compensated by the corporation for his services, that the corporation should have received the benefit of the services by accepting the subscriptions, that it should have had notice of the agreement at the time of such acceptance, and that the services should have been ordered or approved by a majority of the incorporators named in the charter. The Vermont case is put upon the ground, that the corporation had an inchoate existence after its charter was granted, that the services were necessary to complete its organization and, therefore, that a promise to pay therefor would be implied. In *Gunn v. London, etc., Ins. Co.*, 12 C. B. (N. S.) 694; 104 E. C. L. R. 694, it was held that a contract made with the directors of a provisionally-registered company was not binding upon the completely-registered company, though ratified and confirmed by the deed of settlement. To same effect, *Melhado v. Porto Alegre, etc., R. Co.* L. R., 9 C. P. 503.

In general a corporation is not liable for services and expenses incurred in and about its organization, whether in procuring its charter, obtaining subscriptions to its stock or otherwise, and whether there was an agreement with the promoters for compensation or not. *New York, etc., R. Co. v. Ketchum*, 27 Conn. 170; *Rockford, etc., R. Co. v. Sage*, 65 Ill. 328; *Marchand v. Loan & Pledge Assn.* 26 La. Ann. 388; *Frost v. Inhabitants of Belmont*, 6 Allen, 152; *Wilbur v. New York Electric, etc., Co.*, 58 N. Y. Super. 539; *Bell's Gap R. Co. v. Christy*, 79 Penn St. 54; *Tift v. Quaker City Nat. Bank*, 141 Penn. St. 550; 21 Atl. Rep'r, 660; *Melhado v. Porto Alegre, etc., R. Co.*, L. R., 9 C. P. 503. In *Stanton v. New York & Eastern R. Co.*, 59 Conn. 272, the corporation, after it was fully organized, expressly adopted and ratified such a contract, and was held bound by it. In *Tilson v. Warwick Gas-Light Co.*, 4 B. & C. 902; 10 E. C. L. R. 877, and *In re Brampton & L. R. Co.*, L. R., 10 Ch. App. 177, the charters in question expressly provided for the payment of preliminary expenses. In *Rockford, etc., R. Co. v. Sage*, 65 Ill. 328, the court says: "It seems unjust to stockholders, who subscribe and pay for stock in a company, that their stock should be subject to the incumbrances of such claims, and which they had no voice in creating."

**2. Adoption and ratification of contracts made before incorporation.**—The English cases are conflicting as to the power of a corporation to adopt or ratify a contract made before its incorporation. The earlier cases favor the right to

do so. *Williams v. St. George's Harbor Co.*, 2 De Gex & J. 546; *Earl of Lindsay v. Great Northern R. Co.*, 10 Hare, 664; *Bedford & Cambridge R. Co. v. Stanley*, 2 Johns. & H. 746; *Preston v. Liverpool, etc., R. Co.*, 5 H. L. Cas. 605; *In re Hereford, etc., Engineering Co.*, L. R., 2 Ch. Div. 621; *Touche v. Met. Ry. Warehousing Co.*, L. R., 6 Ch. 671; *Spiller v. Paris Skating Rink Co.*, L. R., 7 Ch. Div. 368. The later cases are very decidedly opposed to this view. *Gunn v. London, etc., Ins. Co.*, 12 C. B. (N. S.) 694; 104 E. C. L. R. 694; *Kelner v. Baxter*, L. R., 2 C. P. 174; *Melhado v. Porto Alegre, etc., R. Co.*, L. R., 9 C. P. 508; *In re Empress Engineering Co.*, L. R., 16 Ch. Div. 125; *In re Northumberland Ave. Hotel Co.*, L. R., 83 Ch. Div. 16.

In *Kelner v. Baxter*, L. R., 2 C. P. 174, a proposition to sell certain property was made by the plaintiff to "A., B. and C. on behalf of the proposed Gravesend Royal Alexandria Hotel Company." The proposition was accepted, signed by "A., B. and C., on behalf of," etc. The proposed company was afterward formed and it took possession of and used the property in question, but did not pay for it. In a suit for the price against A., B. and C., individually, they were held liable. It was held that the company could not ratify a contract made before it came into existence; that where one contracts as agent of a principal not in existence, he is liable as principal, and that a stranger cannot, by a subsequent ratification of the contract, relieve him from liability on such contract. Erle, C. J., says: "It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding upon it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made." In *re Northumberland Ave. Hotel Co.*, L. R., 83 Ch. Div. 16, is a very similar case.

In case of *In re Empress Engineering Co.*, L. R., 16 Ch. Div. 125, A. & B. agreed with C., who was acting for a company thereafter to be formed, that they would sell to the company and that the company should buy a certain business and property, and a part of the agreement was that the company should pay J. and P. 60 guineas for services in the organization of the company. The company was formed and expressly ratified the agreement. Afterward an order was made to wind up the company, and J. and P. put in a claim in accordance with the agreement, which was disallowed, on the ground that the company could not ratify the contract. Jessel, M. R., says: "The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence, nor could it become binding upon the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle."

The American cases are uniformly to the effect that a corporation may adopt or ratify a contract, which is within the scope of its powers, made be-

fore its incorporation, with a view to bind or benefit the corporation, and that after such ratification or adoption the contract may be enforced by or against it. *Moore & Handley Hardware Co. v. Tower's Hardware Co.*, 87 Ala. 206; *Little Rock, etc., R. Co. v. Perry*, 87 Ark. 164; *Perry v. Little Rock, etc., R. Co.*, 44 Ark. 383; *Stanton v. New York, etc., R. Co.*, 59 Conn. 272; *Rockford, etc., R. Co. v. Sage*, 65 Ill. 328; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439, 448; *Carey v. Des Moines Co-op. Coal & Min. Co.*, 81 Iowa, 674; 47 N. W. Rep'r, 883; *Grape Sugar, etc., Mfg. Co. v. Small*, 40 Md. 395; *Penn. Match Co. v. Hapgood*, 141 Mass. 145 (see comments on this case and that of *Abbott v. Hapgood*, 150 Mass. 248, at the end of this section); *Battelle v. N. W. Pavement Co.*, 87 Minn. 89; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621; *Low v. Conn. & Passumpsic R. Co.*, 45 N. H. 370; 46 N. H. 284; *Bommer v. Am. Spiral Spring Butt Hinge Mfg. Co.*, 81 N. Y. 468; *Munson v. Syracuse, etc., R. Co.*, 103 N. Y. 58; *Grier v. Hazard*, 18 N. Y. Supp. 583; *Bell's Gap R. Co. v. Christy*, 79 Penn. St. 54; *Swisshelm v. Swissvale Laundry Co.*, 95 Penn. St. 367; *Tift v. Quaker City Nat. Bank*, 141 Penn. St. 550; 21 Atl. Rep'r, 660; *Buffington v. Bardon (Wis.)*, 50 N. W. Rep'r, 776; *Whitney v. Wyman*, 101 U. S. 392. "It is well enough settled that corporations may, by express agreement, assume obligations entered into by the promoters of the corporation prior to its organization, with a view thereto, where the corporation derives the benefit of that in respect of which such obligations were incurred." *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439, 448.

In *Stanton v. New York, etc., R. Co.*, 59 Conn. 273, where there was a written ratification by the railroad company of a contract made before incorporation, the court says: "The directors acted with full knowledge of all the facts, and with such knowledge they 'ratified' the contract. That word itself means the adoption of a previously-formed contract. Ratification relates back to the execution of the contract and renders it obligatory from the outset. By the nature of the act the party ratifying becomes a party to the contract and is on the one hand entitled to all its benefits and on the other is bound by its terms. *Edwards v. Grand Junction Ry. Co.*, 1 Mylne & Cr. 650, 672; *Negley v. Lindsay*, 67 Penn. St. 217, *Sharswood, J.*; *Anderson's Dictionary of the Law, in verbum*; *Low v. Conn. & Pass. Riv. R. Co.*, 45 N. H. 370; *Stanley v. Chester, etc., R. Co.*, 3 Mylne & Cr. 773. A corporation has power when fully organized to ratify a contract made by its promoters when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes. *Morawetz Corp.* 549; *Touche v. Metropolitan Warehousing Co., L. R.*, 6 Ch. App. 671. And the ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into. *Whitney v. Wyman*, 101 U. S. 392; *Angell & Ames Corp.*, § 304; *Church v. Sterling*, 16 Conn. 388; *Fleckner v. Bank of U. S.*, 8 Wheat. 363, *Story, J.*"

It would seem essential that the contract should have been made with the corporation in view and with the intent that the corporation should have the benefit and take the burden thereof. *Perry & Little Rock, etc., R. Co.*, 44 Ark. 383; *Tift v. Quaker City Nat. Bank*, 141 Penn. St. 550; 21 Atl. Rep'r, 660. At least this would be essential in order to enable a corporation, of its own motion, to take the benefit of a contract and enforce it against the other party. In *Little Rock, etc., R. Co. v. Perry*, 87 Ark. 164, which was a suit to recover

for labor and materials, under a contract made with the promoters of the company, the court says: "From all the authorities, it seems clear that, in order to recover in an action at law, the plaintiff must show either an express promise of the new company, or, that the contract was made with persons then engaged in its formation, and taking preliminary steps thereto, and that the contract was made in behalf of the new company, in the expectation on the part of the plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterward entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it."

But where a corporation takes the benefit of a contract, with the consent of those entitled to such benefit by the terms of the contract, and with notice of the burdens or obligations attached, it will be subject to such burdens and obligations, though the contract was not made in behalf of the corporation. *Bommer v. Am. Spiral Spring Butt Hinge Mfg. Co.*, 81 N. Y. 468. In this case the plaintiff having applied for a patent on a certain invention, agreed with certain persons, doing business under the name of the Am. Spiral Butt Hinge Mfg. Co., to assign them his right, to a patent, in consideration of a certain royalty to be paid. Afterward such persons organized the defendant company and became its managers. The patent was issued to the company, which paid royalty for a time according to the contract. In a suit for subsequently accruing royalty, it was held that the corporation had adopted and ratified the contract with the plaintiff, with notice of its obligations, and was bound thereby. The knowledge of its managers was held to be notice to the company.

No particular form of ratification or adoption is necessary. Upon this point the supreme court of Minnesota says: "It is self evident that a corporation is not bound by engagements of its 'promoters' (i. e., those who bring about its organization), assuming to contract for it in advance. It cannot have agents till it has an existence. The promoters are not the corporation, and their contracts cannot be its contracts. This is so, though the promoters become, at the creation of the corporation, its only stockholders, directors and officers. After it comes into existence and operation, it may, by adopting the arrangements thus made for it in advance, make them its contracts, precisely as it might make similar contracts had no previous engagements been entered into. There can be no difference between its making a contract by adopting an agreement originally made in advance for it by promoters, and its making an entirely new contract. No greater formality can be required in the one case than in the other; and if it could make an entirely new similar contract, without the use of its seal, or without writing, or without formal action of its board of directors, it may also so adopt an agreement assumed to be made for it in advance by promoters. It is not requisite that such adoption or acceptance be express, but it may be shown from acts or acquiescence of the corporation or its authorized agents as any similar contract may be shown."

If a corporation takes the benefit of a contract made before its incorporation, it takes subject to the burdens and obligations of the contract, which may be enforced against it. *Battelle v. N. W. Pavement Co.*, 37 Minn. 89; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 631; *Burrows v. Smith*, 10 N. Y. 550; *Bommer v. Spiral Spring Butt Hinge Mfg. Co.*, 81 N. Y. 468; *Bell's Gap R.*

Co. v. Christy, 79 Penn. St. 54; Swisshelm v. Swissvale Laundry Co., 93 Penn. St. 367; Buffington v. Bardon (Wis.), 50 N. W. Rep'r, 776; Grape Sugar, etc., Mfg. Co. v. Small, 40 Md. 895. But in such case, in order that the corporation may be held liable, it would seem necessary that it should have had notice of the burdens and obligations attached to the contract at the time of taking the benefit thereof, or should have retained the benefit after such notice. Low v. Railroad Co., 46 N. H. 384; S. C., 45 N. H. 370; Bommer v. Am. Spiral Spring Butt Hinge Mfg. Co., 81 N. Y. 468. "If with full knowledge of all the facts, but not otherwise, the corporation assumes the contract, and agrees to pay the consideration, or accepts the benefit of the contract, it will be bound thereby." Buffington v. Bardon (Wis.), 50 N. W. Rep'r, 776.

Where the ratification or adoption of the contract was procured by the participation of the plaintiff, who was the principal party interested in having the adoption made, and at the same time was president and a director of the corporation, and the corporation had not taken the benefit of the contract, it was held that it could repudiate the adoption, when sued for a specific performance, though plaintiff was but one of ten directors voting for such adoption. Munson v. Syracuse, etc., R. Co., 108 N. Y. 58.

It remains to notice the Massachusetts cases already referred to, viz.: Penn. Match Co. v. Hapgood, 141 Mass. 145, and Abbott v. Hapgood, 150 Mass. 248. In the opinion in the latter case Knowlton, J. says: "If a contract is made in the name and for the benefit of a projected corporation, the corporation after its organization cannot become a party to the contract even by adoption or ratification of it." Page 252. This sentence is all there is in the opinion in conflict with the long list of American cases above cited and this sentence is pure *dictum*, stating a proposition which could not possibly be inferred from the decision in the case, and, therefore, not decided by it, and a proposition, moreover, which in no way enters into the reasoning of the court. If the sentence was stricken out the opinion would stand perfect and complete and neither the opinion nor the judgment of the court would give any intimation of the doctrine contained in the *dictum*.

Both cases arose out of the same facts. Abbott, Kee and Kempton projected the formation of a corporation, or limited partnership, under the laws of Pennsylvania, to be known as the "Penn Match Company, Limited," to engage in the manufacture of matches. In order to carry on the business successfully it was necessary to have certain machinery which could only be obtained of Hapgood and Smith, the defendants in the two suits. Abbott, Kee and Kempton accordingly went to the defendants, explained to them the whole matter and obtained from them a contract to furnish the machines, which was as follows: "Athol, Mass., March 1, 1882. We, the undersigned, agree to furnish the Penn Match Co., Limited, of Philadelphia, Pa., one setting and one rolling-off machine at prices named (\$200, \$100), cash, f. o. b., on or before April 13, 1882. Hapgood & Smith." By a memorandum attached, defendants agreed to furnish, in addition, four setting and one rolling-off machine. By another writing of the same date the defendants agreed "to furnish the Penn Match Company, Limited, of Philadelphia, Penn., for one year," a certain number of match splints a day. The Penn Match Company was afterward organized

by the plaintiffs, a factory built and preparations made to do business. The defendants on May 24, 1882, refused to furnish the machines. The Penn Match Company, thereupon, brought suit to recover damages for breach of the contracts mentioned. A demurrer to the declaration was sustained by the trial court whose judgment was affirmed. The decision is put plainly upon the ground, that it appeared that the contract was made before the plaintiff company was organized and that there was no allegation of adoption or acceptance by the corporation after its organization.

The court, per W. Allen, J., says: "The power of a corporation to make contracts can be exercised in accepting and adopting proposed contracts made in its name and behalf before its incorporation. Such a contract must derive its vitality from the meeting of minds when both parties are in existence; until then, it can be nothing more than an offer by one party." The opinion and the decision are fully in accord with the American doctrine on the subject.

The corporation having thus failed in its suit, Abbott, Kee and Kempton brought another suit against the same defendants upon the same contracts, alleging that they were made with them under their associated name of the Penn Match Company, Limited. The court held that there was a manifest intent that the contracts should be binding *in presenti* and that, as the corporation was not then in existence, the only possible parties were the defendants on the one hand and the plaintiffs, under their associated name, on the other; and that, being binding contracts with the plaintiffs, they were entitled to recover upon them. No claim was made, and there were no allegations or evidence tending to show, that the corporation adopted or ratified the contract after it came into existence and thereby became substituted in place of the plaintiffs and so became the only proper party to sue. Nothing in the case called upon the court to decide whether a corporation could adopt or ratify a contract made before its organization. There is nothing, therefore, in these two Massachusetts cases in conflict with the general doctrine, except the *obiter dictum* of Knowlton, J. See, also, Hudson Real Estate Co. v. Tower (Mass.), 30 N. E. Rep'r, 465.

3. Liability of promoters upon contracts made by them.—Persons who assume to make contracts in behalf of a proposed corporation are personally liable thereon unless there is an agreement to look exclusively to the corporation. Carmody v. Powers, 60 Mich. 26; Doubleday v. Muskett, 7 Bing. 110; Higgins v. Hopkins, 3 Exch. 163; Landman v. Entwisth, 7 Exch. 632; Kerridge v. Hesse, 9 C. & P. 200; 38 E. C. L. R. 126; Kelner v. Baxter, L. R., 2 C. P. 174.

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## BANKS AND BANKING.

### CHECKS.

1. *Refusal of bank to pay check — liability for damages.* A banker who refuses to cash a check drawn by a depositor engaged in trade, who has sufficient funds on deposit to meet the check, is liable therefor in substantial damages, even though the refusal was caused by mistake, and there is no evidence of special damage or of actual malice. *Schaffner et al. v. Ehrman et al.* (Ill.), 216.

2. *Effect of certified check as payment.* One taking a certified check in the ordinary course of business does not assume the risk of the solvency of the bank upon which it is drawn, and there is no release of the drawer in the absence of an express or implied agreement to that effect. *Born v. First Nat. Bank* (Ind.), 103, note.

3. *Presentation — failure of bank — discharge of drawer.* The drawer of a check in Philadelphia upon a city bank in favor of a payee residing in the city is discharged from liability by the failure of the payee to present the check for three days, during which time the bank fails. *National State Bank v. Weil* (Penn), 103, note.

4. *Delivery of check not payment.* A check on a bank is not payment, but is only so when the money is received on it; and there is no presumption that a creditor takes a check in absolute payment arising from the mere fact that he accepts it from his debtor. *National Bank of Commerce v. Chicago, etc., R. Co.* (Minn.), 103, note.

5. But where a depositor, having sufficient funds standing to his credit, tenders his check on his bank in payment for negotiable paper which it has for sale, and the bank accepts the check, and charges it against the deposit, and delivers over the paper, the acceptance of the check amounts to payment, and the depositor is a purchaser of the paper for value, the antecedent debt of the bank to him being to that extent extinguished. *Ibid.*

6. *Presumed to be drawn on bank where dated.* Checks dated at "LaFayette, Indiana," and drawn on the "First National Bank," support an allegation that



BANKS AND BANKING — CHECKS — *Continued.*

they were drawn upon the "First National Bank of LaFayette, Indiana." *Culver v. Marks (Ind.)*, 104, note.

7. *When presentation unnecessary.* Presentation of a check to the bank and notice of non-payment is not necessary, when the drawer has no funds on deposit for its payment at the time when it should be presented, or, having funds, withdraws them, or where, by agreement of the parties, the check is not to be presented. *Ibid.*

8. *Effect to transfer legal title to funds.* Where a master in chancery, who has deposited in bank in a separate account a sum of money held by him as master for the benefit of one person, gives such person a check for the entire sum, the delivery of the check transfers to the payee the legal title to the deposit, and an indorsement and delivery of the check by the payee, before the fund has been garnished by his creditors, transfers title to the indorsee, as against the creditors. *Hemphill v. Yerkes (Penn.)*, 104, note.

9. Where executors, who are invested with discretion to distribute an estate among the testator's children in such manner and at such times as in their judgment will best promote the children's interests, deposit money in a bank to the credit of the estate, and afterward give an ordinary check to a child in part distribution, the child does not receive title so as to enable a receiver, appointed in proceedings supplementary to an execution against him, to sue the bank before the check is presented for payment, since the deposit of money in a bank merely makes the bank a creditor of the depositor, and the giving of an ordinary check neither operates as an assignment of the fund, nor gives the drawee any right of action against the bank. *O'Connor v. Mechanics' Bank (N. Y.)*, 104, note.

10. Under the Pennsylvania act of May 10, 1881 (P. L. 17), which provides that no person shall be charged as an acceptor on an order drawn for the payment of money unless his acceptance shall be in writing, no action can be maintained against a bank, on an unaccepted order drawn on it by a depositor, though the order is for the entire balance due him, and amounts to an equitable assignment of the fund. *Maginn v. Dollar Savings Bank (Penn.)*, 105, note.

## COLLECTIONS.

11. *Liability of collecting bank for defaults of its sub-agents.* A bank which sends a draft received for collection to sub-agents, who collect it, and remit a draft on third persons for the amount, which the bank then sends to another bank for collection, is liable to the owner of the original draft, where the sub-agents' draft is not paid, and they in the meantime become insolvent. *St. Nicholas Bank of New York v. State Nat. Bank (N. Y.)*, 97.

12. *Insolvency of collecting bank — conflicting claims to proceeds of collection.* Certain bankers, having collected a draft for plaintiff, remitted to him on March 17 by exchange drawn by them on New York. This was presented on March 22, and payment refused, as these bankers had failed on the 18th. It was shown that it would have been paid if presented on the 18th. Held that, as plaintiff did not receive it until March 19, the delay in presenting it did not prejudice his right to recover against the receiver of such bankers. *Kinney v. Paine (Miss.)*, 105, note.

BANKS AND BANKING — COLLECTIONS — *Continued.*

13. The drawer of the draft was indebted to the bankers on book account, and after their assignment plaintiff filed a bill to enforce a trust in his favor on this debt. Certain creditors had bought all the assets of the bankers, and claimed to be *bona fide* purchasers of the debt of such drawer. Held, that their purchase had no effect on plaintiff's rights. *Ibid.*

14. The drawers of a draft deposited with a bank for collection, and by it forwarded to a correspondent bank, which collects it and credits the proceeds to the forwarding bank, are entitled to recover the amount from the collecting bank (it being still in the hands of that bank) as against the receiver of the forwarding bank, which was insolvent, and known to be so by its officers, when it received the draft, and suspended payment before the proceeds were withdrawn from the collecting bank. *Importers & Traders' Bank v. Peters* (N. Y.), 105, note.

15. That the drawers of the draft included it in their claim against the insolvent bank, presented to and allowed by the receiver, does not affect their right to recover the proceeds of the draft from the collecting bank, as against the receiver, when it appears that, on discovering the facts constituting the fraud on the part of the officers of the insolvent bank, they paid back to the receiver the dividends already received on the draft, and refused to accept any further dividends on it. *Ibid.*

16. *Negligence in making collection—condonation.* Plaintiff deposited with defendant, a bank, his own check on another bank. Defendant, instead of collecting the check, exchanged it for a bank-draft, which was not paid, and then notified plaintiff that it held the draft subject to his order. Plaintiff thereupon, with knowledge of all the facts, directed defendant to hold the draft for a few days, and, if not paid, send it to him. Held, that the plaintiff had condoned defendant's negligence, and could not hold it liable for not collecting his check. *Hazlett v. Com. Nat. Bank* (Penn.), 105, note.

## DEPOSITS AND DEPOSITORS.

17. *Application of deposits to debt of depositor—rights of third parties—notice.* In a suit against a bank for the amount of certain checks drawn by a firm of millers in plaintiff's favor, and which, although there were moneys to the drawer's credit, were refused payment because the bank retained such moneys for the discharge of a debt about to fall due to itself, an allegation that such moneys were the proceeds of wheat sold to the drawers by plaintiff, and were deposited for the payment of such checks, and for no other purpose, was not sufficient to charge the bank as a trustee, in the absence of an averment that it was a party to the agreement, or had notice thereof. *Boettcher v. Colorado Nat. Bank* (Col.), 106, note.

18. A bank, in which a certified check is deposited by one to the credit of another for the special purpose, of which the bank has notice, of meeting a check drawn by the latter in favor of the depositor of the certified check and indorsed by such depositor, has no right to apply any part of the amount of the certified check to a debt due it from the person to whose credit it is deposited. *Straus v. Tradesmen's Nat. Bank* (N. Y.), 106, note.

19. Upon an assignment for the benefit of creditors, a bank cannot set off a deposit to the credit of the assignor against a note held by it against him, but

**BANKS AND BANKING — DEPOSITS AND DEPOSITORS — Continued.**  
not due at the time of the assignment. *Outman v. Batavian Bank* (Wis.), 106, note.

20. *Suit by principal to recover funds deposited by agent in his own name.* A principal may maintain a bill in equity against a bank to recover moneys deposited therein by his factor as the proceeds of property consigned to him for sale, since the legal title thereto is in the factor and the principal could not have an action at law. *Union Stock-Yards Nat. Bank v. Gillespie* (U. S.), 106, note.

21. *Relations of bank to its depositors.* A bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. *Janin v. London & San Francisco Bank* (Cal.), 284.

#### DIRECTORS.

22. *Liability of directors for losses through the frauds of officers — degree of care to be exercised by directors.* A director of a bank, whose services are gratuitous and whose duties are to attend the bank once or twice a week to assist in discounting paper, to see how much money there is to loan, and once or twice a year to count the cash on hand, and examine the bills receivable and securities to see whether they correspond with the statement furnished by the officers, does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such gross negligence as amounts to fraud. *Swentzel et al. v. Penn Bank et. al.* (Penn.), 645.

23. A bank president, abetted by the cashier and several clerks, embezzled almost all the funds of the bank, and concealed the fraud by false entries in the books. His statement to the directors from time to time showed the bank to be in good condition. No fraud was discoverable in any of the books except the individual ledger, which, by a rule of the bank conforming to a custom largely prevalent, the directors were not allowed to see. The directors were among the heaviest stockholders, and at the first suspension they raised nearly \$300,000 on their individual credit to enable the bank to resume payment. Held, that the directors were not guilty of gross negligence. *Ibid.*

#### FORGED CHECKS AND DRAFTS.

24. *Payment of forged checks — liability to depositor.* The payment of a check which, though purporting to be drawn by the depositor, turns out to be a forgery, is made at the peril of the bank and it is not justified in charging it against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is, upon equitable principles, estopped to deny the correctness of such payments. *Janin v. London, etc., Bank* (Cal.), 284.

25. *Effect of negligence of the depositor in discovering and giving notice of the forgery — statement of account by bank.* Where the bank, after payment of a forged check, balances the depositor's bank-book, charging him with the forged check and delivers the book with the canceled checks to the depositor,

BANKS AND BANKING—FORGED CHECKS AND DRAFTS—*Continued.*

and the latter neglects for an unreasonable time to examine the account, discover and give notice of the forgery, the depositor is not thereby estopped from impeaching the account, but he may prove the forgery and consequent incorrectness of the statement, and the burden will then be upon the bank to show that it has been prejudiced by such negligence, and failing to do this, it will be liable for the amount of the forged check. *Ibid.*

26. *Suit to recover amount paid by bank on forged check—Instructions.* Where a bank allowed over three months to elapse before it returned to a depositor a forged check drawn on his account and payable to "currency or bearer," that it had paid without requiring the bearer's indorsement or identification, and there was no evidence that the bank could have retrieved its loss if notified of the forgery, the depositor's neglect within a reasonable time after the return of his canceled checks to examine them, and give notice of the forgery, was not a defense to an action to recover the money paid on such check; and hence the bank was not prejudiced by an erroneous instruction to the effect that the depositor was not guilty of negligence in failing to examine the checks and bank-book, and that he became bound to give notice of the forgery only after he had discovered it. *Ibid.*

27. *Payment of forged draft by drawee to bona fide holder—liability of latter.* The drawee of a bill of exchange or draft is bound to know the handwriting of his customer, the drawer; and if he pays a bill or draft in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill or draft turns out to be a forgery. *Northwestern Nat. Bank of Chicago v. Bank of Commerce (Mo.)*, 256.

28. *Facts held to show one to be a bona fide holder of a forged draft.* W., on December 17, 1885, presented to defendant bank at Kansas City a letter of introduction from a bank at Nevada, showing his genuine signature, and also a certificate of deposit, a small portion of which he collected, leaving the balance on deposit. He rented an office, and December 22 employed a book-keeper. On the same day he deposited with defendant a draft on New York for \$3,500, drawn by an Omaha bank, and on December 23 drew \$2,500. On the afternoon of the same day he deposited a draft for \$4,000, drawn by an Omaha bank on plaintiff bank at Chicago. On December 24 he drew \$4,500, and left town. At that time his balance in defendant bank was \$550. Defendant, December 24, sent the draft of \$4,000 to its correspondent in Chicago, "for collection," and it was paid by plaintiff bank, the drawee, through the Chicago clearing-house on December 26. January 4 it was sent to the drawer bank at Omaha, where it was found to be a forgery. The officers of the Omaha bank, as well as the clerk whose name was signed to the draft, at first thought it genuine. Due notice of the forgery was given to all parties, but W. could not be found. Held, that defendant was not negligent in its dealings with W., either before or after presentation of the draft, and that it was a *bona fide* owner of the draft; that by its indorsement of the same "for collection," it only guaranteed the genuineness of the payee's signature, and retained the title thereto until it was paid by the drawee bank, of which fact the latter had notice by such indorsement, and an action would not lie by the drawee to recover the amount thereof. *Ibid.*

BANKS AND BANKING — *Continued.*

## INDORSEMENT.

29. *Indorsement "for collection" — effect.* The indorsement of a draft "for collection" limits the effect which would have been given to a general or blank indorsement, and warns parties dealing with it that there is no intent to transfer the ownership or proceeds of a draft. *Northwestern Nat. Bank v. Bank of Commerce (Mo.)*, 256.

## NATIONAL BANKS.

30. *Statutory remedy for usury — limitations.* The limitation of two years within which suit may be brought against a national bank, under section 5198 of the United States Revised Statutes, for taking usurious interest, begins to run from the time when such interest is paid. *National Bank of Rahway v. Carpenter (N. J.)*, 107, note.

31. Where commercial paper is transferred to, and discounted by, a bank at a greater rate of interest than six per cent, and the net proceeds after deducting the interest charged, are credited to the transferor, this is a payment of the interest, within the meaning of the statute. *Ibid.*

32. *Venus of action for penalty.* An action may be brought in any county or district court in the county in which a national banking association is located, having jurisdiction of the amount involved, for a penalty, under section 5198 of the Revised Statutes of the United States. *Schuyler Nat. Bank v. Bollong (Neb.)*, 107, note.

33. *Amount of recovery.* In an action against a national banking association, for a penalty, under section 5198 of the Revised Statutes of the United States, the plaintiff may recover double the amount of interest actually paid, and is not confined to double the amount of usury paid. *Ibid.*

34. *Powers — taking security.* A banking corporation organized under the laws of the United States can take an assignment of the money due and to become due from a city of the second class, on a contract for paving a street, from the contractors, to secure an existing, *bona fide* indebtedness by the contractor to the bank. *First Nat. Bank v. Ottawa (Kans.)*, 107, note.

35. *Contracts — ultra vires — remedy.* Though a national bank is not authorized to purchase municipal bonds and agree to return them to the seller at the purchase-price or less, yet when the amount which it paid for the bonds is tendered back to it, and their surrender demanded, its authority to retain them no longer exists; and the fact that the contract under which it obtained them may be illegal will not prevent the seller from maintaining an action for their value, as such action is not in affirmance of the contract, but in disaffirmance of it, and to prevent the bank from retaining the benefit which it has derived from its unlawful act. *Logan County Nat. Bank v. Townsend (U. S.)*, 107, note.

## TAXATION.

36. *Meaning of word "banker" in statutes.* One whose business is buying and selling stocks for his customers, and who employs capital in his business, and has a regular place for transacting it, is a "banker," within the meaning of Revised Statutes of United States, sections 3407, 3408, which provide that every person "having a place of business \* \* \* where money is advanced or loaned on stocks, bonds," etc., "or where stocks, bonds," etc.,

BANKS AND BANKING — TAXATION — *Continued.*

"are received for discount or for sale, shall be regarded as a \* \* \* banker," and impose a tax "on the capital employed by any person in the business of banking." *Richmond v. Blake* (U. S.), 107, note.

37. *National banks — taxation by territory.* Under Revised Statutes of the United States, section 5134 et seq., providing for the incorporation of national banks in both states and territories, the territories have the same power to tax national banking associations located in them as have the states, notwithstanding that section 5219, which expressly confers the power to tax such associations, only mentions states, and provides that, in assessing taxes imposed by the authority of the "state within which the association is located," the shares in such association may be included in the valuation of the personal property of the owner of them. *Talbott v. Silver Bow County* (U. S.), 108, note.

38. *The words "other moneyed capital" construed.* The provision in section 5219 above, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," is not violated by Revised Statutes of Montana, division 5, chapter 53, section 1008, providing that when the "entire capital stock of any incorporated company shall be invested in assessable property in the territory of Montana, such stock shall not be taxed," as the restriction imposed by section 5219 refers to other "moneyed capital," used in making a profit on money by the use of the moneyed capital as money, not to capital invested in mining, manufacturing or transportation. *Ibid.*

39. *Tax upon dividends — defenses.* The tax of five per cent imposed by act of congress, June 30, 1864, section 120, upon all dividends declared to stockholders "as part of the earnings, income or gain of any bank," was assessable against the bank for the whole amount of dividends so declared, notwithstanding that it had paid a sum to the state of New York, under act of New York April 23, 1866, imposing a tax against the stockholders upon the value of their shares, and requiring the bank to retain the amount thereof from the dividends due them, until it was made to appear that their tax was paid. *Central Nat. Bank v. United States* (U. S.), 108, note.

40. *Statement of bank as to dividends conclusive — subsequent discovery of embezzlements.* The act of a bank in declaring a dividend, and making a sworn return of the taxes due thereon, as required by section 120 of the act of congress, was conclusive as to the liability of the bank, and it could not avoid paying the tax by showing that, owing to an undiscovered embezzlement by its cashier, there were no "earnings, income or gains" for the year, and that the dividends were in fact ignorantly paid out of the capital and accumulated surplus of former years. *Ibid.*

41. *Privilege taxes on banks.* A statute of Mississippi providing for a privilege tax upon banks in proportion to their capital stock or assets, the same to be in lieu of all other taxes, was upheld as constitutional and valid. *Vicksburg Bank v. Worrell* (Miss.), 108, note.

42. *Exemption of treasury notes — statutes construed.* Under Revised Statutes of Texas, 1879, article 4684, placita 4, as amended by laws of Texas 1883, page 111, providing that private bankers shall list for taxation their money on hand and in transit, and in the hands of others subject to draft, except

BANKS AND BANKING — TAXATION — *Continued.*

treasury notes, and their bills receivable and other credits, and that from this aggregate shall be deducted the amount of "money on deposit," they are entitled to deduct the full amount due depositors, though part of the money deposited may have been treasury notes, "money on deposit" being general deposits, and not special deposits held by bank as a bailee. *Griffin v. Heard* (Tex.), 108, note.

43. Treasury notes accumulated by a bank as part of its reserve by retaining such notes when received over its counter, and paying out other money, are exempt from taxation, though one of the purposes of selecting and retaining them may have been to escape taxation on that amount of money. *Ibid.*

## MISCELLANEOUS.

44. *Receiving deposits when insolvent — criminal liability.* The acts of the eighteenth general assembly of Iowa, chapter 158, provide that no bank or firm engaged in banking, shall accept or receive on deposit any money when such bank or firm is insolvent, and any officer of such bank, or member of such firm, who receives a deposit, knowing of such insolvency, shall be guilty of a felony, etc. An indictment under this statute alleged that defendants, a firm engaged in banking, were, on a date specified, insolvent, and, being so, that they accepted and received on deposit a certain sum of money. Held, that evidence is admissible that the deposit was received by the cashier of defendants' bank during their absence, it being immaterial whether they did the act constituting the offense in person or by an agent. *State v. Calwell* (Iowa), 106, note.

45. *What is a deposit — certificates of deposit.* A certificate of deposit, signed by the cashier of defendants' bank, certifying that a certain person had deposited therein a named sum, payable to her own order, in current funds, on return of the certificate properly indorsed, is evidence of a deposit, within the meaning of such statute and not of a loan. *Ibid.*

46. *What constitutes insolvency within the act.* A bank or firm, etc., engaged in banking, is insolvent, within the meaning of such statute, when it is unable to meet its liabilities as they become due in the ordinary course of business. *Ibid.*

47. *Cashier's bond — liability of sureties — defenses.* The by-laws of a bank provided for the appointment of an "exchange committee," without whose sanction the cashier was to make no loans above a certain amount. The committee was to consist of the president, cashier and a designated director, of whom a majority were to have power to act. Held, that the failure to designate a director does not affect the power of the president and cashier to act as such committee. *Wallace v. Exchange Bank* (Ind.), 109, note.

48. An agreement of the board of directors of a bank, increasing the salary of a cashier in consideration of his performing additional duties, not changing his duties as cashier, or his relation to the bank as such, does not release the sureties on a bond previously given for the faithful performance of his duties as cashier from liability for a breach of duty as such cashier. *Ibid.*

49. *Discounting note of depositor — discharge of indorser.* A bank which has discounted a note made by one of its depositors, but payable elsewhere, does not relieve the indorser from responsibility, by not applying the maker's

BANKS AND BANKING — MISCELLANEOUS — *Continued.*

deposit to the payment of the note. *Sieger v. Second Nat. Bank (Penn.)*, 109, note.

50. *Direction of depositor to pay certain debts — insolvency of bank — trust.* A person directed his bank to pay certain debts, which would mature during his absence, and gave a check to cover the amount. The bank paid one creditor with a sight draft on its own correspondent, and failed before the draft was paid. A receiver was appointed, and plaintiff, holder of the draft, filed a bill to have the receiver declared a trustee of the assets for its benefit. Held, that a trust was not created by the mere revocable direction of the debtor, to which plaintiff was not a party. *Louisville Banking Co. v. Paine (Miss.)*, 109, note.

51. *Cable transfers by bank — disregard of instructions — liability.* Plaintiff purchased of defendant in New York a cable transfer of £5,000 to M. & Co. of Glasgow, and directed that a check for that amount should be sent by mail from defendant's London office to Glasgow. Defendant knew that this money belonged to plaintiff, and was sent to M. & Co. for the purpose of paying a draft he had drawn on them therefor. Defendant cabled the order to its London office, and the amount was placed to M. & Co.'s credit at the Bank of Scotland in London, pursuant to general instructions from M. & Co., and M. & Co. were notified by letter which reached them February 23, and expressed their assent. The next day M. & Co. suspended, and the £5,000 in question was appropriated by the Bank of Scotland to the payment of overdrafts of their account, so that plaintiff derived no benefit therefrom and was afterward compelled to pay his draft. Held, that defendant being plaintiff's agent, and dealing with property known to be his, is liable for the loss resulting from its failure to follow his instructions. *Bank of British North America v. Cooper (U. S.)*, 110, note.

52. *Foreign bill of exchange, what is.* A Cincinnati bank drew a draft upon a New York bank to the order of a Chicago bank — held it was a foreign bill of exchange. *Armstrong v. Am. Exchange Nat. Bank (U. S.)*, 110, note.

53. *Estoppel of drawer to deny consideration — notice.* The Cincinnati bank represented to plaintiff, the Chicago bank, that one W. was a *bona fide* holder of the bill, as purchaser or remitter, for his use in trading with K., and plaintiff relying on such representation took the bill on deposit from K., knowing that he had received it from W., placed it to his credit as cash, and paid his checks, held that the drawing bank or its receiver is estopped, in an action on the bill, to show that W. was not a *bona fide* holder. The fact that the bill was payable to plaintiff's order is not notice to it that W. was not the purchaser or remitter. *Ibid.*

See INTERSTATE LAW, 2, 3.

## BONDS.

## MUNICIPAL.

1. *Issue beyond constitutional limit — recitals — bona fide holder.* Certain county bonds issued under Act of Colorado, February 21, 1881, recited that all the requirements of the act had been fully complied with; that the issue was authorized by the vote of a majority of the qualified electors voting at a general election, and that the whole amount of the issue did not exceed the limit of indebtedness prescribed by the constitution. The bonds themselves afforded no data from which the total amount of the issue was ascertainable. Held, that as against a *bona fide* holder, the county was estopped by the recitals



BONDS—MUNICIPAL—*Continued.*

from questioning the validity of the bonds on the ground that the percentage of indebtedness allowed by the constitution was exceeded. *Chaffee County v. Potter* (U. S.), 336.

2. *Issue in excess of constitutional limit—validity.* When the bonded indebtedness of a school district is already in excess of the constitutional limit, a further issue of bonds for the purpose of "funding the outstanding bonded indebtedness of the district," which bonds are sold for that purpose, is void though made pursuant to statutory authority. *Doon Township v. Cummins* (U. S.), 535.

3. *Effect of recitals.* Recitals in the bonds that the same are in accordance with the law and the constitution, will not estop the district as against one who purchases the same directly from the district to an amount in excess of the constitutional limit as shown by public records of which he was bound to take notice. *Ibid.*

4. *Payment of interest—ratification.* The payment of interest on the bonds for several years could not have the effect of validating the bonds by ratification since a ratification can have no greater effect than a previous authority, and as neither the district nor its officers had power to authorize the bonds, they could not ratify or validate them by the payment of interest or otherwise. *Ibid.*

See IRRIGATION.

## CARRIERS.

## OF PASSENGERS.

1. *Who are common carriers of passengers.* A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. *Gillingham v. Ohio River R. Co.* (W. Va.), 320.

2. *One riding in car presumed to be a passenger.* Every one riding in a railroad car is presumed *prima facie* to be there lawfully, as a passenger having paid, or being liable when called on to pay, his fare. *Ibid.*

3. *Duty of carrier to its passengers generally.* It is the duty of the carrier to treat the passenger properly, and carry him safely, to protect the passenger against any injury from the negligence or willful misconduct of its servants while performing the contract, and of his fellow-passengers and strangers, so far as practicable. *Ibid.*

4. The common carrier of passengers is not an insurer of their safety or of their proper treatment, but is liable for their injury or improper treatment, due to the negligence or willful misconduct of its servants while engaged in executing the contract. *Ibid.*

## ASSAULT UPON PASSENGER.

5. *By fellow-passenger—liability.* It is the duty of a railway carrier of passengers to exercise the highest diligence reasonably practicable to preserve order on its trains, and protect passengers against violence, abuse or injury from fellow-passengers. This duty is exercised under an implied police power to prevent an abuse of their privileges by passengers. *Mullan v. Wisconsin Cent. R. Co.* (Minn.), 19.

6. In an action for injuries received by plaintiff, a colored man, while a pas-

CARRIERS — ASSAULT UPON PASSENGER — *Continued.*

senger on defendant's train, it appeared that he was requested to leave a car where he was seated and go into another car, because of his boisterous conduct, but refused to go into the other car, and remained on the car platform, where he was assaulted by a fellow-passenger and received the injuries sued for. A judgment for the defendant was affirmed. *Royston v. Illinois Central R. Co.* (Miss.), 21, note.

## EJECTING PASSENGER.

7. *Mistake in cash fare — demanding additional amount — ejectment — rights and duties of company.* Plaintiff, without a ticket, though he had full opportunity to procure one, boarded defendant's train at Faribault, to go to Owatonna, and, when he told the fare collector where he was going, the latter told him the fare was fifty cents, which he paid. This was more than the ticket fare, but six cents less than the train fare. Before the train arrived at Walcott, the first station at which the train was to stop, the collector informed plaintiff of his error in the amount of the fare, and required him to pay the six cents, which plaintiff refused, and the collector told him unless he paid it, he must leave the train. On arrival at Walcott, where the train stopped, the plaintiff persisting in his refusal, the collector put him off, and then returned him the fifty cents, less the fare from Faribault to Walcott. Held, that the collector, on discovering the mistake, might, within a reasonable time, require plaintiff to pay the other six cents. Also that, notwithstanding his first refusal, the plaintiff might, at any time before the arrival at Walcott, still pay the six cents, and secure the right to be carried to Owatonna. Also that the collector's retention of the fifty cents till the arrival at Walcott was not a waiver of the right to require payment of the six cents. Also that the company had a right to be paid the fare from Faribault to Walcott, and the collector might retain it out of the fifty cents. Also that the collector could not retain the entire amount, and also put plaintiff off, but could put him off only upon first returning to him the fifty cents, less the fare to Walcott, and having put him off before doing so, the expulsion was wrongful. *Wardwell v. Chicago, M. & St. P. Ry. Co.* (Minn.), 15.

## FALSE IMPRISONMENT OF PASSENGER.

8. *Liability for false imprisonment of passenger caused by conductor.* The common carrier of passengers is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train, during his execution of the carrier's contract to treat properly and convey safely. *Gillingham v. Ohio Riv. R. Co.* (W. Va.), 320.

9. *Effect of statute making conductors conservators of the peace.* Section 81, chapter 145, of the Code, which enacts among other things, that "the conductor of every train of railroad cars shall have all the powers of a conservator of the peace while in charge of the train," does not relieve the carrier of passengers from such liability. *Ibid.*

10. *Liability for false imprisonment of passenger caused by servant of company.* Defendant's ticket agent, acting under a notice given him by police officials to look out for a five-dollar counterfeit, and describing three men passing the same, supposing a bill presented at his window by plaintiff in payment for tickets to be one of the counterfeits, and supposing plaintiff and

CARRIERS—FALSE IMPRISONMENT OF PASSENGER—*Continued.*

his companion to be the persons described, after giving plaintiff his tickets and change, sent for a police officer and directed their arrest, while they were seated on the station platform waiting to take the next train. The officer stated that he knew the two men as reputable men, and that there must have been a mistake, but the agent insisted upon their arrest for passing counterfeit money, and they were arrested, but were, after an hour, discharged, the bill passed being pronounced genuine. Held, that the agent was acting without the line of his duty in taking the bill which he supposed to be counterfeit and causing the arrest; and, it not appearing that plaintiff was at the time of his arrest in the agent's custody or under his protection, with respect to the execution of the contract of transportation, defendant could not be made liable for his conduct. *Mulligan v. New York, etc., R. Co. (N. Y.), 836, note.*

## INJURIES TO PASSENGERS.

11. *Getting on car while in motion — contributory negligence.* Plaintiff was injured while attempting to get on board a street-car propelled by electricity, which he had signaled to stop. He attempted to enter before it came to a full stop; it started suddenly, throwing him down. Held, that the question of his contributory negligence was for the jury. *Corlin v. West-End Street Railway Co. (Mass.), 124*

12. *Boarding moving street-car — plaintiff thrown off by sudden jerking of car.* In action for personal injuries, the evidence for plaintiff showed that, as a street-car approached, he signaled twice, being in full view of the conductor and person driving, and that after the second signal the horses commenced to slacken their speed, and came to a walk as they approached the crossing where he stood; that he seized the rail and placed one foot upon the step, and was raising the other, when the conductor called, "Don't stop there," and the horses were given a slap with the lines, which caused a sudden jerk, throwing plaintiff to the ground. Held, that the case was properly submitted to the jury, both as to negligence of defendant and contributory negligence of plaintiff. *Butler v. Glens Falls, etc., Street R. Co. (N. Y.), 127, note.*

13. *Plaintiff incumbered with luggage.* One who, having his left arm incumbered with his coat and dinner-bucket, attempts to board a street-car while still in motion, and falls off by reason of the slipping of his foot from the step on which he has placed it, and of his inability to hold on to the car with his right hand alone, is guilty of contributory negligence. *Reddington v. Philadelphia Traction Co. (Penn.), 127, note.*

14. *Starting car suddenly while plaintiff is in the act of alighting.* It is the duty of the driver of a horse-car, when signaled to stop, to ascertain who and how many of his passengers intend to alight at that place, to wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts the car in motion, and if he fail in any of these respects, and injury results, his employer is liable. *Birmingham Union Ry. Co. v. Smith (Ala.), 127, note.*

15. *Boarding moving railroad train.* In an action against a railroad company for personal injuries, the evidence showed that plaintiff, a man of sixty-

CARRIERS — INJURIES TO PASSENGERS — *Continued.*

five, on a dark and cold night, after waiting in the snow and becoming benumbed, attempted to board a moving train; that, with a valise in one hand, he seized the railing with the other, and attempted to leap upon the platform, but missed his footing and was dragged one hundred and fifty yards, during which time he held on to the valise. Held, that plaintiff was guilty of such contributory negligence that he could not recover, though the train did not stop a reasonable time, so as to allow plaintiff to get on. *McMurtry v. Louisville, etc., R. Co. (Miss.)*, 125, note.

16. *Effect of acting under directions of conductor.* Where a person having the care of stock in a freight-car, requiring his attention, attempted to enter the car with the sanction of the conductor, and under his assurance that it would be safe, and that he would have ample time to do so before the train moved, and was injured by the sudden and unexpected movement of the train while in the act of entering the car, held, that the company was liable. *Olson v. St. Paul, etc., R. Co. (Minn.)*, 128, note.

17. The conductor of a railway train has control of its movements, and represents the corporation, and persons boarding a car with his consent have a right to rely upon his assurance that it is safe to undertake so to do before the train moves. *Ibid.*

18. Where the conductor of a freight train has ordered a passenger to go to a coach attached to a freight train and get in it, and then signals the engineer to start the train, without waiting to see whether the passenger had gotten on, the company is not liable for injuries received by him in trying to get on the car in motion, where the train had already been stopped a reasonable time, and the passenger had willfully delayed to get on it. *Browne v. Raleigh, etc., R. Co. (N. C.)*, 128, note.

19. A passenger who is injured while attempting, by direction of the conductor, to board a moving train while in such proximity to a raised platform as to render the consequences of a misstep possibly serious, is guilty of contributory negligence, even though the train is not moving faster than one or two miles an hour. *Hunter v. Cooperstown, etc., R. Co. (N. Y.)*, 128, note.

20. *Alighting from moving railroad train.* Alighting from a moving railroad train is, in general, such contributory negligence as will bar a recovery for injuries received in making the attempt. *Whelan v. Georgia, etc., R. Co. (Ga.)*, 128, note.

21. *Starting train while plaintiff in act of alighting — negligence.* A female passenger having been injured by the train starting while she was getting off, the company is not entitled to a charge that its contract was performed on the arrival of the train, if the station was announced, and the train stopped a sufficient time to give her an opportunity to alight, and that its servants were not bound to assist her in alighting. *St. Louis, etc., R. Co. v. Finley (Tex.)*, 128, note.

22. *Starting of train due to accidental pulling of bell-rope by passenger.* At the trial of an action against an elevated railroad company for injuries sustained by a passenger while stepping from the car to the station platform, owing to the sudden starting of the train, a witness testified that, to steady himself when the train stopped, he caught hold of the bell-cord, and thereby gave the signal which caused the train to start. The court charged that if the jury

CARRIERS — INJURIES TO PASSENGERS — *Continued.*

found that the train was so started then defendant was not negligent and plaintiff could not recover. Held, that defendant could not have been prejudiced by the refusal of the court to charge that there was no proof that there was any vice in the system of communicating signals or that the method of fixing the bell-rope was not the best method and that the jury were not to consider these questions. *Ferry v. Manhattan Ry. Co.* (N. Y.), 129, note.

23. *Running train past station—backing same while passenger in act of alighting.* The running of a railway passenger train beyond the usual stopping place at the station, and then pausing a sufficient length of time to reverse the motion so as to back it to the proper stopping place, is not of itself negligence; but whether the pause was so long that it indicated an invitation to the passengers to alight, and whether the backward movement was made without warning while they were alighting, are questions of fact for the jury. *Sherwood v. Chicago, etc., R. Co.* (Mich.), 129, note.

## LIMITING LIABILITY.

24. *Limiting liability for loss to a specified amount.* The giving by an express company, and the acceptance by a shipper, of a printed receipt valuing a package received for transportation at \$50, and limiting the liability of the company for loss to that amount, unless the value was otherwise therein expressed, is, in the absence of an expression of greater value, a valid agreement as to the extent of the company's liability where the package was lost through the negligence of the company. *Ballou v. Earle et al.* (R. I.), 134.

25. *Limiting liability for loss by negligence.* A provision in shipping bills that the carrier should not be responsible for delay in the transit of the property does not relieve it from liability for delay occasioned by its own negligence. *Jennings v. Grand Trunk Ry. Co.* (N. Y.), 548.

## OF FREIGHT.

26. *Facts showing contract for through shipment.* In pursuance of an inquiry from a shipper, a railroad company informed him of the through rates of transportation for certain goods to a point beyond its own line. The goods were subsequently delivered to the company, and received by it addressed to such point, which the company could reach by means of connecting railroads. Held, in an action for the non-delivery of some of the goods and delay in delivering others, that these facts were sufficient to justify a finding that the company had agreed to transport the goods beyond its own line to the place to which they were consigned. *Jennings et al. v. Grand Trunk Ry. Co. of Canada* (N. Y.), 548.

27. *Authority of agent of shipper—effect of accepting bill of lading.* The carrier, which had entered into a contract with the shipper for the transportation of the goods to the place of destination, had no right to make inconsistent stipulations with the persons who delivered the goods for the shipper; and provisions and conditions in the shipping bills, signed by such persons without the knowledge of the shipper, limiting the liability of the carrier to points on its own road, cannot be considered as applicable to the shipment in question. *Ibid.*

28. *Stipulation requiring notice of claim applicable to shipments beyond line.* A provision in shipping bills exempting the carrier from liability for damages,

CARRIERS — OF FREIGHT — *Continued.*

unless a written notice of the particulars of the claim is given to the freight agent at or nearest the place of delivery, within thirty-six hours after the goods have been delivered, is applicable to shipments beyond the carrier's line, as well as to shipments to points on its line. *Ibid.*

29. *Where the time limited will be deemed unreasonable.* Such provision, which limits to thirty-six hours from the delivery of the goods the time within which notice of the particulars of the claim can be given, is void, in so far as it applies to a shipment of a car-load of potatoes, since the time allowed for making the examination and preferring the claim is unreasonably short. *Ibid.*

30. *Contract of shipment.* When controlled by negotiations prior to shipment. 559, note.

31. Authority of agent of shipper delivering goods. 559, note.

32. *Bill of lading.* When terms of, not binding upon shipper. 559, note.

## CHARGES, REGULATION OF.

1. *Regulating charges of grain elevators.* The business of receiving grain in elevators for storage or transfer, as at present conducted, is one affected with a public interest, and the question of what is a reasonable compensation for the service rendered by such elevators is a legislative and not a judicial one. *Munn v. Illinois*, 94 U. S. 118, approved and followed. *Budd v. New York (N. Y.)*, 610.

2. *Statute of New York fixing a maximum rate for elevator service held valid.* The Laws of New York of 1888, chapter 581, fixing a maximum charge of five-eighths of a cent per bushel for elevating, receiving, weighing and discharging grain by means of floating or stationary elevators, in any city of the state containing a population of one hundred and thirty thousand or over, is not a taking of private property without due process of law, but is a valid exercise of the police power, as well in its application to elevators owned by private individuals as to those owned by companies having chartered privileges from the state, since the business, as carried on, is affected with a public interest, and is a practical monopoly. *Ibid.*

3. The further provision that, in transferring grain to and from vessels and canal-boats, the charge for shoveling to the leg of the elevator when unloading and for trimming cargo when loading, shall be limited to the actual cost of the outside labor employed therein, does not render the act invalid, since under cover of a charge for this work the purpose of the statute might easily be evaded. *Ibid.*

4. *Validity of act as affected by questions of interstate commerce.* The fact that the elevators are largely employed in the transfer of grain which is in course of transportation from the western states to the seaboard does not render the act obnoxious, as a regulation of interstate commerce. *Ibid.*

5. *Railroad companies — regulating charges of — power of the states.* State legislatures have power to fix maximum rates of railroad passenger fare, and the courts can only interfere therewith to protect the roads from unreasonable rates. *Chicago & Grand Trunk R. Co. v. Wellman (U. S.)*, 638.

6. The acts of Michigan 1889, No. 202, fixes a maximum rate of two cents per mile on all railroads whose gross yearly passenger earnings exceed \$3,000, but make no regulation in regard to freight charges. Held, that, in an action

CHARGES, REGULATION OF — *Continued.*

in damages for refusal to carry a passenger at the maximum rate, the court properly refused to instruct the jury that the law was unconstitutional in its application to the road in question, merely upon an agreed statement showing that its income at existing rates was entirely consumed by operating expenses and fixed charges, and the testimony of two of its officers that an increase of freight rates would diminish its income by throwing business to competing roads; since such an instruction required the court to hold that this testimony was conclusive in law, and to assume, as a matter of law, that a reduction in passenger fares would not bring an increase of travel sufficient to equalize the earnings. *Ibid.*

7. *State regulation of foreign railroad doing business therein.* The constitution of Arkansas, article 12, section 6, provides that corporations may be formed under general laws, which may be altered or repealed; that the general assembly shall have power to alter or revoke the charter of any corporation, provided that "no injustice shall be done to the corporators." Section 11 provides that foreign corporations doing business in the state shall be subject to the same limitations and regulations as domestic, and shall not exercise any greater privileges or franchises than they do. Held, that a foreign railway company, having entered the state to operate a road after the above provisions were in force, was subject to legislation reducing passenger rates, provided, only, such reduction did no injustice to the corporators. Held, also, that the company could not claim immunity from state regulation in respect to rates because its right of way was granted by the government, which declared it to be a post and military route, and national highway for governmental service. *St. Louis, etc., R. Co. v. Gill (Ark.)*, 637.

8. *Criterion for determining reasonableness of rates.* The question as to the justice of the regulation of passenger rates must be determined by its effect on the net earnings of the entire line operated by defendant company, and not by its effect on the net earnings on any given subdivision of the whole line, even though such subdivision was formerly a separate road, owned by a different corporation which was consolidated with defendant. *Ibid.*

## CHARTER.

See FORFEITURE.

## CONFLICT OF LAWS.

See INTERSTATE LAW.

## CONSTITUTIONAL LAW.

1. *Power to compel railroad corporations to pay expenses of railroad commissioners.* Private corporations are "persons" within the constitution of the United States, fourteenth amendment, section 1, prohibiting the states from depriving any "person" of property without due process of law, etc. *Charlotte, C. & A. R. Co. v. Gibbes, County Treasurer (U. S.)*, 575.

2. The provisions of General Statutes of South Carolina, 1883, chapter 40, that the entire expenses of the railroad commission, which is thereby created and invested with general supervision of all railroads in the state, "shall be borne by the several corporations owning or operating railroads" within the state "according to their gross income proportioned to the number of miles in the state,"

CONSTITUTIONAL LAW — *Continued.*

is not in conflict with the constitution of the United States, fourteenth amendment, section 1, forbidding deprivation of property without due process of law, and securing to every person equal protection of the laws, as the business of such corporations is affected with a public use, and subject to legislative regulation, and the regulations imposed are within the power of the state to prescribe, and the exercise of the duties of the commissioners is beneficial to the public, and also to the railroad corporations. *Ibid.*

3. *Foreign railroad corporations—excise tax—interstate commerce.* The act of Maine, 1881, requires every corporation, etc., operating a railroad in the state, to pay "an annual excise tax for the privilege of exercising its franchises," the amount of the tax to be determined according to a sliding scale proportioned to the average gross earnings per mile within the state for the year preceding the levy of the tax. Held, that the method of determining the amount of the tax is merely a way of ascertaining the value of the privilege, and does not render the tax a tax upon the receipts themselves, and hence in its application to railroads which enter the state from another state or from Canada, the act does not operate as a regulation of interstate or foreign commerce. *Maine v. Grand Trunk Ry. Co. of Canada* (U. S.), 248.

4. *Limiting of operation of act to cities of a specified population. Validity.* The fact that the operation of an act is limited to cities having a population of one hundred and thirty thousand or over, does not render it unconstitutional, as denying the equal protection of the laws. *Budd v. New York* (U. S.), 610.

5. *Whether power of court to decide upon the validity of a statute may be invoked by an amicable suit.* The power of a court to pass upon the constitutionality of an act of the legislature should not be invoked by means of an amicable suit, especially where there is an agreed statement. This power is the supreme judicial function, and its exercise is only legitimate in the last resort, in the determination of an earnest and vital controversy. *Chicago, etc., R. Co. v. Wellman* (U. S.), 638.

See BONDS, 1-4; CHARGES, REGULATION OF; IRRIGATION; MUNICIPAL CORPORATIONS, 23, 24, 31-37; STOCK AND STOCKHOLDERS, 3; WATER COMPANIES.

## CONTRACTS.

## PRIVATE CORPORATIONS.

1. *Validity of contract made by corporation before capital paid in and certificate filed.* Public Statutes of Massachusetts, chapter 106, section 46, providing that no corporation "shall commence the transaction of the business for which it was organized" until the whole of its capital stock has been paid in, and a certificate of such payment filed in the office of the secretary of state, and sections 61, 62, providing that the stockholders shall be jointly and severally liable for debts or contracts prior to that time, and that their liability shall be conditional upon the recovery of a judgment against the corporation, do not render a contract void which has been entered into by the corporation before the capital has been paid and certificate filed as required, but the effect of the statutes is simply that the personal liability of the members of the corporation takes the place of what has not been paid in on the stock as security for the performance of the contract. *Chase's Patent Elevator Co. v. Boston Towboat Co.* (Mass.), 129.



CONTRACTS — PRIVATE CORPORATIONS — *Continued.*

2. *Mortgage executed without authority of board of trustees.* Where the charter of a corporation provides that its property shall be purchased, held, managed and sold by a board of five trustees, a mortgage executed by the president and secretary, without any action of the board authorizing or ratifying, was held invalid and not binding on the corporation. *Nucleus Association v. McElroy* (Penn.), 188, note.

3. *Assent of board or stockholders individually given, not sufficient — ratification.* Where a mortgage was executed by the president, secretary and two stockholders of a corporation and no corporate seal was attached, and the only evidence of authority to execute was that the secretary obtained the consent of a majority of the stockholders, by going around to them privately, it was held error to admit it in evidence as against the corporation; also that the use of the money derived from the mortgage would not of itself amount to a ratification. *Duke v. Markham* (N. C.), 184, note.

4. *Authority of president to give a judgment note.* Where a corporation has contracted to give its judgment note, it thereby authorizes the president to execute such note on its behalf. *McDonald v. Chisholm* (Ill.), 184, note.

5. *Note executed by treasurer — presumption of authority.* Where there is nothing to show that a corporation does not possess the usual power of a trading corporation to make notes, or that the treasurer had not the usual authority of treasurers of such corporations, it will be presumed that a note executed in the name of the corporation by the treasurer was duly authorized. *Corcoran v. Snow Cattle Co.* (Mass.), 184, note.

6. Authority of president to bind corporation by contract. 151, note.

7. Contracts of promoters, adoption or ratification of. 747, note.

8. Whether contract executed in name of officer may be shown to be contract of corporation. 184, note.

## MUNICIPAL CORPORATIONS.

9. *Contract with water company for a term of years. Validity.* A city of the second class granted to a water company the exclusive privilege of furnishing water for public and private use, and contracted with it for a supply of water for fire purposes for twenty-one years. After the company had constructed its plant and had furnished water pursuant to the contract for three years, which the city had paid for, the latter declined to use or pay for the water and repudiated the contract. In a suit by the water company for a *mandamus* to compel the city to levy a tax to pay the water rents due according to the contract it was held, (1) that the questions arising upon the exclusive feature of the contract were not material to the case, as no other company was claiming in opposition to the exclusive grant; (2) that the contract was not void, even though not authorized for a term of twenty-one years, that having been executed by the company, as far as execution was possible, and no change in conditions appearing, it would be upheld for a reasonable period at least. *Columbus Water Co. v. Mayor, etc., of City of Columbus* (Kan.), 724.

10. Contracts granting exclusive rights to furnish water or light. 740, note.

See BONDS, 35; CARRIERS, 26-32; CORPORATIONS, 5-8; DIRECTORS AND OFFICERS, 2, 3, 9-23; TRUSTS; WATER COMPANIES.

## CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

## CORPORATIONS.

1. "*Legal entity*" of corporation a fiction. When it may be disregarded. That a corporation is a legal entity, apart from the natural persons who compose it, is a mere fiction, introduced for its convenience in the transaction of its business, and of those who do business with it; but, like every other fiction of the law, when urged to an intent and purpose not within its reason and policy, may be disregarded. State, ex rel. Attorney-General, v. Standard Oil Co. (Ohio), 679.

2. When act of majority of stockholders will be treated as act of the corporation. Where all, or a majority, of the stockholders composing a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation, and against public policy, and was done in their individual capacities, for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation, and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*. Ibid.

3. Corporate existence — recording certificate. The statutes of Tennessee provide that a railroad company's charter shall first be registered in the county where the company's principal office is; that it shall then be transmitted to the secretary of state, who shall affix his certificate of registration and the great seal of state, and that these shall be registered where the charter was originally registered; and that this shall complete the company's corporate charter. Held, that, where a company was organized to run a railroad through several counties, the county where its charter has been so registered shall be deemed to have been determined on as the location of the principal office, and holding a directors' and stockholders' meeting in another county will not change the fact, and registration in such other counties is not essential. Anderson et al. v. Middle & East Tennessee Cent. R. Co. (Tenn.), 345.

4. Formation of corporation — evidence of user. Under a certificate of incorporation duly issued to five corporators, one of them acted as president of the company, although it did not appear how or when he was elected. Another acted as its treasurer, and kept a check-book, and made disbursements for the company by check, and received and put in bank what money came to it. He also had charge of the stock-book, though at the time he testified he did not know where it was. The president, vice-president, treasurer and one other stockholder were directors. One of the corporators testified that he had stock in the company, which he paid for, and that he refused to go into the business, unless under an incorporation. Held, that this was sufficient evidence of user to show an acceptance by the company of its charter. Demarest v. Flack (N. Y.), 264.

5. Adopting contract made by promoters. While a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after it is organized, make such engagements its contracts by adopting

CORPORATIONS — *Continued.*

them as its own ; and this it may do in the same manner as it might make similar original contracts. *McArthur v. Times Printing Co.* (Minn.), 743.

6. *Adoption does not relate back to making of contract.* The act of the corporation in adopting such engagements is not a ratification, which relates back to the date of the making of the contract by the promoter, but is, in legal effect, the making of a contract as of the date of the adoption. *Ibid.*

7. *Statute of frauds — performance within a year — time computed from date of adoption by corporation.* Hence, although the contract made in behalf of the contemplated corporation was, by its terms, not to be performed within one year from the date of the making thereof by the promoter, it is not within the statute of frauds if it be performed within one year from the date of its adoption by the corporation after its organization. *Ibid.*

8. *Contracts of promoters.* Subject treated in note. 747, note.

9. *Acts in foreign state.* Capacity of a corporation to exercise its powers in a foreign state. 277, note.

10. *Election of unqualified directors — effect upon corporate existence.* A certificate of incorporation was duly issued to residents of New York by the secretary of state of West Virginia, pursuant to Code of West Virginia, 1884, chapter 54, which provides that the incorporators "shall, from the date of the said certificate, \* \* \* be a corporation," and also provides for the holding, subsequent to the issue of such certificate, of a general meeting of the stockholders to elect directors, make by-laws, etc., and permits the corporation to prescribe the qualifications of directors, but requires that, if it is not otherwise provided, every director must be a resident of the state of West Virginia. Held, that the election of directors who were not residents of West Virginia, although no by-law permitting it had been adopted, did not *ipso facto* dissolve the corporation, or take away its corporate rights or franchises. *Demarest v. Flack* (N. Y.), 264.

11. *Mortgage of the corporate property — authority — validity.* A mortgage of all the property of a corporation to secure an existing debt and future advances, must be duly authorized by the board of directors or it will be invalid. *Bank of Little Rock v. McCarthy* (Ark.), 520.

12. When such a mortgage was ordered at a special meeting attended by four out of five directors, and no notice of the meeting was served upon the one who was absent, and it did not appear that any sufficient emergency or necessity existed for making the mortgage, it was held invalid as to the existing indebtedness, no money having been advanced after the making of the mortgage. *Ibid.*

13. *Foreign corporations.* Rights by comity. 277, note.

See CONTRACTS; DIRECTORS AND OFFICERS; FORFEITURE; MEETINGS; STOCK AND STOCKHOLDERS; TAXATION; TRUSTS; WATER COMPANIES.

## DAMAGES.

1. *For refusal to pay check, whether excessive.* Where a banker has refused to pay four checks of plaintiff for the aggregate sum of \$900, a verdict for \$450 damages is not excessive. *Schaffner v. Ehrman* (Ill.), 216.

2. *Death by wrongful act — measure of damages.* Howard's Statutes of Michigan, section 3391, provide that, whenever the death of a person shall be

DAMAGES — *Continued.*

caused by the neglect of any railroad company, the railroad company, which would have been liable if death had not ensued, shall be liable for damages, notwithstanding the death of the person so injured. Section 3392 provides that every such action shall be brought in the name of the personal representatives of such deceased person, and the jury may give such amount of damages as they shall deem fair and just, to the persons who may be entitled to such damages when recovered. Held, that where a railroad company negligently caused the death of one who contributed to the support of his mother and invalid sister, and an action is brought against the company, the proper measure of damages, under the statute, is the amount which deceased would have contributed to the support of his mother during her expectancy of life, in proportion to the amount he was contributing at the time of his death, and the amount he would have contributed to the support of his sister after the death of his mother, not exceeding the time of his expectancy of life. *Richmond v. Chicago, etc., R. Co.* (Mich.), 22.

See RAILROADS, 43-46, 49-55, 72, 73.

## DEATH BY WRONGFUL ACT.

1. *Distribution of damages — by what statute governed.* Where damages are recovered by the personal representative of one killed by the negligence of a railroad company, the distribution of the amount recovered is governed by the statute in force at the time of the killing. *Richmond v. Chicago, etc., R. Co.* (Mich.), 22.

See DAMAGES, 2.

## DIRECTORS AND OFFICERS.

## DIRECTORS.

1. *Fiduciary relations of directors.* The directors of a corporation occupy a position of the highest trust and confidence, and the utmost good faith is required in the exercise of the powers conferred upon them. They have no right, under any circumstances, to use their official positions for their own benefit or the benefit of any one except the corporation itself, and consequently they have no authority to represent the corporation in any transaction in which they are personally interested in obtaining an advantage at the expense of the corporation. *Mallory v. Mallory-Wheeler Co.* (Conn.), 509.

2. *Contract with corporation for salary, when voidable.* Where three persons, a majority of the directors of a corporation, each being a salaried officer, pass a vote appointing one of their number as the agent of the corporation to make a contract with the others, and then pass another vote appointing one of the latter to make a contract with the first one, continuing in force for a certain time agreements which were about to expire, and by which they were to receive a certain salary, such contracts are voidable by the corporation, as the directors occupy a fiduciary position, and have no authority to represent the corporation in any transaction in which they are personally interested. *Ibid.*

3. Where such contracts were made in October, 1887, and there was nothing to show that the stockholders had any knowledge of them until the day of their next meeting, which was in May, 1888, and no other meeting was held until May, 1889, when new directors were chosen, who promptly repudiated them, the delay was not such as to preclude the corporation from availing itself of the original invalidity of the contracts. *Ibid.*

DIRECTORS AND OFFICERS — DIRECTORS — *Continued.*

4. *Degree of care and diligence to be exercised by directors in the discharge of their duties.* 658, note.

5. *When action of directors valid though meeting not duly convened.* The action of directors at a meeting held without due notice to those not attending, will be invalid, unless notice was impracticable and there existed an emergency and reasonable necessity for the action taken. *Bank of Little Rock v. McCarthy* (Ark.), 520.

6. *Meetings of directors.* Of the notice required. 528, note.

7. *Qualifications of directors.* One may lawfully act as trustee of a corporation in New York though not a stockholder therein. *McDowell v. Sheehan* (N. Y.), 210, 215, note.

8. *Must act in meeting.* Directors can only act in a meeting duly convened, 528, note.

## THE PRESIDENT.

9. *Authority of president to contract.* Where plaintiffs, in an action against a corporation for services rendered, introduce evidence that they were employed by defendant's president, who assumed to act in its behalf, the admission in evidence of defendant's by-laws to show that the president had no such authority will not work a reversal, as the jury must have been so instructed as matter of law had the evidence been excluded. *Wait et al. v. Nashua Armory Association* (N. H.), 149.

10. *Powers of the president.* Power to institute and defend suits and employ counsel. 151, note.

11. Power to sell, mortgage or otherwise dispose of the corporate property. 152, note.

12. Power over the negotiable paper and choses in action of the corporation. 153, note.

13. Power to borrow money and issue negotiable paper. 153, note.

14. Power to make contracts generally. 154, note.

15. Power to receive payment. 157, note.

16. Power to confess judgment. 157, note.

17. Power to bind corporation by admissions or representations. 157, note.

18. Powers of, *virtute officii*, generally. 159, note.

19. Powers of, as affected by general custom and usage. 161, note.

20. Powers of, as affected by the course of business of the corporation. 161, note.

21. Powers incidental to those expressly conferred. 162, note.

22. Presumption of authority in case of acts performed by. 162, note.

## THE VICE-PRESIDENT.

23. Powers of, generally. 163, note.

## REPORTS OF.

24. *Liability of trustees for failure to file annual report — excuse — ceasing to do business.* A corporation closed its business in December, 1886, but it did not appear that it could not resume its business. Two of the four trustees applied to the attorney-general to bring an action to dissolve the corporation. The action was commenced January 15, 1887, and was opposed by the other trustees. A receiver was appointed March 7, 1887. Held, that the trustees

DIRECTORS AND OFFICERS — REPORTS OF — *Continued.*

were not relieved from the duty imposed on them by law to file the annual report in January, 1887. *First Nat. Bank of Jersey City v. Lamon* (N. Y.), 440.

25. *A false report cannot be treated as no report.* General Statutes of Colorado, section 252, require every corporation to make an annual report stating the amount of its capital, the proportion thereof actually paid in, and the amount of existing debts; and it provides that a failure to file this report shall render the directors and trustees jointly and severally liable for the debts of the company contracted during the year preceding the time for filing it. Held, that where a report is actually filed, the fact that it is false will not render them liable under this section as upon failure to file any report at all. *Matthews v. Patterson* (Col.), 444, note.

26. *Liability for knowingly signing false report — scienter.* Section 255, General Statutes of Colorado, provides that all the officers who have signed such false report, knowing it to be false, shall be jointly and severally liable for all damages thereon arising. Held, that in an action to enforce this liability, the complaint is demurrable where it fails to state that officers knew the report was false. *Matthews v. Patterson* (Col.), 444, note.

27. *Statute requiring reports and accounts to be posted each month — action for penalty.* In an action for a penalty against a gold mining company brought under Statutes of California, 1880, page 134, which provides that such corporation shall on the first Monday of each month make and have posted in the office of such company certain reports and accounts current for the previous month, an answer denying the allegation of the complaint that said company had an office for the transaction of business is insufficient to raise a material issue, Civil Code, sections 290, 321, contemplating that all corporations shall have a place of business. *Chapman v. Dovay* (Cal.), 444, note.

See CONTRACTS, 3-8; CORPORATIONS, 10, 11; MEETINGS.

## ELECTRICITY.

See MUNICIPAL CORPORATIONS, 41-43; RAILROAD, 17.

## ELEVATORS.

See CHARGES, REGULATION OF.

## EMINENT DOMAIN.

## WHAT CONSTITUTES A TAKING OR DAMAGING OF PROPERTY.

1. *Erecting fire-engine house on adjacent lot.* The erection of a fire-engine house by a city upon a lot adjacent to the plaintiff's premises, although it will, to some extent, depreciate the value of his property, does not work a *taking* or *damaging* of his property within the meaning of the constitution, and a bill will not lie to enjoin such action by the city. *Van de Vere v. Kansas City et al.* (Mo.), 196.

2. *Construction of words "damaged" "injured" and "injuriously affected."* 201, note.

3. *Vacating street — injury to abutting owner.* 115, 117, note, 192, 221. See STREETS AND HIGHWAYS.

4. *Railroads in streets.* See RAILROADS, 36-74.

EMINENT DOMAIN — *Continued.*

## PUBLIC USE.

5. *Taking for elevated tramways.* In condemnation proceedings by an elevated tramway corporation organized under Laws of New York, 1888, chapter 463, it appeared that the southerly terminus of petitioner was accessible only by a private road, and that up to the date of the petition the road had been used solely for transporting stone for a private corporation in which the incorporators of petitioner were interested. It was claimed that it was the intention to carry freight for any person offering the same to the extent of its surplus capacity after supplying the private corporation. Held, that in view of the object of its corporate existence, and the manner in which it had been and was to be operated, the evidence failed to establish that the taking sought was for public use. In re Split Rock Cable-Road Co. (N. Y.), 164.

6. *Waiver of right to raise the question of public use.* Where the owner of land resists condemnation proceedings on the ground that the proposed railway is not a public use, her failure to appeal from a decision that the purpose was public, and her consent to the selection of commissioners, and litigation of questions of value, do not amount to a waiver of her rights so as to preclude her from afterward moving to set aside the entire proceedings as unauthorized by law, after the court of appeals has decided in another similar proceeding that the railway company in question is a mere private enterprise. In re Niagara Falls & Whirlpool Ry. Co. (N. Y.), 168, note.

## THE STATUTORY AUTHORITY.

7. *Is strictly construed.* The grant of authority to condemn private property for public use, like all grants by the government, is to be strictly construed. 184, note.

8. *Power of city to widen street for benefit of railroad company.* A city council has no power to condemn land for widening a street for the express purpose of giving a railroad company the use of a portion of the street in such a manner as to exclude all other travel therefrom. *Ligare v. Chicago* (Ill.), 176.

9. *Power of city to fill up and destroy a navigable water-way.* A street cannot, by condemnation proceedings, be so laid out across a navigable water-way as to destroy the water-way. *Ibid.*

## GRANTOR AND GRANTEE.

10. *Rights of, when conveyance made pending a wrongful possession by railroad company.* A railroad company began proceedings to condemn a right of way over plaintiff's land. A few months afterward plaintiff sold the land by an absolute deed. Subsequently the condemnation proceedings were dismissed. Plaintiff then brought suit for damage for the construction of the road across this land, plaintiff's vendee being made a party defendant. The company filed a plea asking for a condemnation of the land. Held, that plaintiff was entitled to compensation for the injury to the land resulting from the construction of the road and for the use of the land occupied by the company from the time of its entry to the date of the sale by plaintiff, and that plaintiff's vendee was entitled to recover for the value of the land taken, and for any such decrease in value of the remaining land as might have resulted from

EMINENT DOMAIN — GRANTOR AND GRANTEE — *Continued.*

the acquisition by the company of a permanent right of way. *Fordyce v. Wolf* (Tex.), 205.

11. *Right to damages as between grantor and grantees.* 208, note. See RAILROADS, 47, 48.

VESTING OF TITLE.

12. Under the constitution of Texas the title to property attempted to be appropriated to public use, does not vest until the compensation has been paid or secured. *Fordyce et al. v. Wolfe* (Tex.), 205.

See IRRIGATION; RAILROADS, 36-74; RIPARIAN RIGHTS; STREETS AND HIGHWAYS.

EXPRESS COMPANIES.

See CARRIERS.

ESTOPPEL.

See BANKS, 53; INSURANCE, 5, 7, 46-51, 83-84.

EVIDENCE.

1. *In accident cases — evidence of other accidents at same place.* On the trial of an action against a town for an injury occasioned by a defect in a highway, when one of the issues in the case was the position of a plank at the end of a bridge, and whether it rendered the way unsafe for travelers, evidence that other persons with their vehicles had received injuries at the place of the alleged defect is not admissible to show that the way is defective. *Bremner v. Newcastle* (Me.), 56, note.

2. In an action against a city for personal injuries sustained in a fall on a sidewalk, caused by plaintiff's slipping on a mound of ice, the testimony of a witness that, two years prior to said accident, he fell on the ice at the same place is incompetent to show either that the walk was unsafe or that defendant had notice of its condition. *Gillrie v. Lockport* (N. Y.), 56, note.

3. *Evidence of other defects in close proximity to one causing the accident.* In an action for injuries caused by a defect in a sidewalk, evidence of other defects, in close proximity to the one causing the injury, is admissible, as tending to show notice to the municipal authorities of such defect. *O'Neill v. Village of West Branch* (Mich.), 57, note.

4. Where the injury was occasioned by a loose plank in a sidewalk, it was held competent to show that the walk was defective for the entire block, as tending to show notice to the defendant. *McConnell v. City of Osage* (Iowa), 57, note.

5. *Proof of changes after accident.* See *Presby v. Grand Trunk R. Co.* (N. H.), 42.

6. *Affirmative and negative testimony.* An instruction that affirmative testimony, as that a bell was rung or a whistle was sounded, is entitled to more weight than negative testimony, as that such bell or whistle was not heard, is properly refused, as ignoring the fact that in weighing such testimony the credibility and means of knowledge of the witnesses should be considered. *Pence v. Chicago, etc., R. Co.* (Iowa), 36.

See INSURANCE, 12; RAILROADS, 56-60.



## FOREIGN CORPORATIONS.

1. *Validity of an incorporation of residents of New York under laws of West Virginia to do business in the former state.* The laws of West Virginia, under which a certificate of incorporation was issued to residents of New York to do business in the latter state, made it the duty of the secretary of state, before issuing such a certificate of incorporation, to decide whether the application therefor conformed to the laws of West Virginia, and also made the certificate evidence of the existence of the corporation. The laws of New York also permitted the incorporation of individuals for the purpose of doing the business contemplated, and under those laws the freedom from personal liability would be as great and as easily attained, and the security of creditors would not be substantially greater in the case of a domestic as of a foreign corporation. Held, that such incorporation was not invalid, as a fraud or evasion of the laws either of West Virginia or of New York, as the policy of West Virginia plainly favored the formation under its laws of corporations composed of non-residents, the principal business of which was to be performed outside of the state; and the policy of New York in recognizing foreign corporations formed for the purpose of doing business in that state was not violated even where such a corporation was composed of citizens of the state. *Demarest v. Flack* (N. Y.), 264.

2. *Whether an incorporation under foreign law is intended as an evasion of domestic laws, is a question of law for the court.* The question whether an incorporation under the laws of West Virginia, of residents of New York, for the purpose of doing business in the latter state, is invalid in that state as an attempted evasion of its laws, is a question of law for the court, and the question of evasion should not be submitted to a jury as matter of fact. *Ibid.*

3. *Rights of foreign corporations by comity.* Right to do business in a state. 278, note, 280, note.

4. Exclusion of, on grounds of public policy. 282, note.

## FORFEITURE.

1. *For failure to make annual report.* The failure of a manufacturing corporation to make an annual report as required by the manufacturing act of 1848, section 12, is cause for dissolving the corporation, under Code, section 1798, which declares that a corporation may be annulled whenever it offends against any provision of an act under which it was created. *People v. Buffalo Stone and Cement Co.* (N. Y.), 668.

2. The fact that said section 12 imposes a penalty upon the trustees for a failure to make the report required does not exempt the corporation from the consequences of such failure on the principle that where one penalty is declared no other can be implied, since the penalty imposed is upon the trustees and not upon the corporation. *Ibid.*

3. *For failure to pay in capital stock within time prescribed.* General manufacturing act, section 10, provides that the capital stock of corporations formed thereunder "shall be paid in, one-half in one year and the other half in two years from the incorporation, or the corporation shall be dissolved." Held, that where, in an action brought by the attorney-general by leave of court to dissolve a corporation, it is proved that the corporation has violated said act, the court has no discretion to refuse a judgment of dissolution. *Ibid.*

FORFEITURE — *Continued.*

4. *Suit at instance of officers in default.* Where an action to dissolve a corporation is brought by the attorney-general in the name of the people, without a relator, the fact that the persons who applied to him to bring the action were the very officers whose neglect to perform their official duties constitutes the cause for dissolution is no bar to the action. *Ibid.*

5. *For an unauthorized change of name.* An attempt by a corporation to change its corporate name in a manner not authorized by law does not avoid its charter. *O'Donnell v. C. R. Johns & Co. (Tex.)*, 675, note.

6. *Perversion of funds of temperance organization.* The forfeiture of the charter of a corporation cannot be maintained on an averment in the information in the nature of a *quo warranto* that the corporation was formed to "promote the cause of temperance," and that it has abused its trust and misappropriated its funds, as it cannot be said that the perversion of the fund from so vague an object as "temperance" is a public injury. *People, ex rel., v. Dash-away Assn. (Cal.)*, 675, note.

7. *Quo warranto to forfeit charter. Limitation of action.* A proceeding in *quo warranto* to forfeit the charter of a corporation must, under section 6789 of the Revised Statutes, be commenced within five years after the act complained of was done, whether commenced by the state on relation of the attorney-general or otherwise; but a corporation may be ousted by such proceeding from the exercise of a power or franchise not conferred by law, where the same has not been exercised for a term of twenty years. *State v. Standard Oil Co. (Ohio)*, 679.

See INSURANCE, 23-37, 46-51.

## INJUNCTION.

1. *Fire limits—enjoining violation of ordinance.* Where a city ordinance prohibits the erection of wooden buildings within its fire limits, individuals who show a threatened violation of the ordinance, and that if unrestrained it will work irreparable injury to them and their property, are entitled to an injunction, though the building if erected would not be a nuisance *per se*. *First Nat. Bank of Mt. Vernon et al. v. Sarlls et al. (Ind.)*, 77.

2. *Joinder of parties.* Where the owners of separate and distinct tenements would each be injured by the erection of a building prohibited by ordinance, they may join in action to restrain the erection of such building. *Ibid.*

3. *Debt in excess of constitutional limit—suit by tax-payer to enjoin.* Any tax-paying resident and voter of a city, suing on behalf of himself and of all other tax-payers of such city, has a right to enjoin the creation of any unconstitutional indebtedness. *Spillman v. Parkersburg (W. Va.)*, 870.

4. *Railroad in street.* Injunction to prevent. 490, note.

5. *Penal ordinances.* Jurisdiction to enjoin enforcement of. 90, note.

## INSURANCE — FIRE.

## AGENTS.

1. *Whether of insurer or insured.* An insurance broker called upon the assured and asked permission to place insurance for him. This was granted and the selection of the company left to the broker. The broker applied for the insurance to a company with which he never before or afterward had dealings.

INSURANCE — FIRE — AGENTS — *Continued.*

The application was granted, a policy filled out, the name and address of the broker was indorsed thereon, and it was then delivered to the broker who, in turn, delivered it to the assured. The policy provided that if "any broker \* \* \* have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company." The premium was paid to the broker, but did not reach the company. Held, in an action on the policy for a loss which occurred after the company had notified the assured of the cancellation of the policy for non-payment of the premium, that, even if the assured could be permitted to show that the broker was the agent of the company in procuring the insurance, there was no evidence to support such a finding. *Wilber v. Williamsburgh City Fire Ins. Co.* (N. Y.), 10, note.

2. An insurance broker procured from the general agent of defendant company for plaintiffs a policy of insurance, which was delivered on condition that it should not take effect until approved at the home office of the defendant. Held, that the broker continued to be the agent for plaintiffs until the policy had been acted on at the home office; and notice to the broker of its rejection was notice to plaintiffs. *Young v. Newark Fire Ins. Co.* (Conn.), 10, note.

3. *Estoppel to deny contract or power of agent.* Where the recognized agent of an insurance company issues a policy of insurance, receives the premium, and forwards it to the company, and after waiting the usual time for a reply, and receiving none, delivers the policy to the insured, in an action on the policy, the company cannot deny its own power to issue the policy or the authority of the agent. *Hoge v. Dwelling-House Ins. Co.* (Penn.), 12, note.

4. *Assignment — consent of agent — waiver of condition.* A firm, agents of an insurance company, procured a policy on the property of their debtor, payable to themselves in case of loss. Afterward, the debtor sold the property, and assigned the policy to the purchaser, with the consent and at the solicitation of the agents. The policy was conditioned to be void, if assigned in case of sale, unless the assignment was approved by the president or secretary of the company. This consent was never asked for, nor obtained. Held, that the policy was forfeited, as there was no waiver of the condition as to assignment, since the agents were in the first place the beneficiaries, and could not, therefore, bind the company by their acts. *Cascade Fire & Marine Ins. Co. v. Journal Pub. Co.* (Wash.), 12, note.

5. *Estoppel to deny authority of.* Where a special agent and adjuster of an insurance company, pending negotiations after loss, confers with assured and her attorney concerning the proofs thereof, and employs an attorney to assist in the investigation of the loss, and seeks to secure a cancellation of her claim on the repayment of the premium, and without informing her of the existence of any limitation on his authority to bind his principal, positively refuses to pay the claim, the company will be estopped to deny the agent's authority to bind it, and the agent's refusal to pay will constitute a waiver by the company of the provision of the policy allowing sixty days after proof of loss in which to make payment. *California Ins. Co. v. Gracey* (Col.), 11, note.

6. *Their powers — waiver by.* Evidence that a certain person was local agent of an insurance company in certain counties, and had authority to solicit and write applications for insurance, and forward them to the company's general

INSURANCE — FIRE — AGENTS — *Continued.*

agent, and, on receipt of the policy from the latter, to deliver it and collect the premium, does not show that he had authority to consent to additional insurance, within the meaning of a provision of a policy that if additional insurance was procured without "notice to and consent of" the company in writing, the policy should be void, or to waive such provision. *American Fire Ins. Co. v. Hampton* (Ark.), 458, note.

## APPLICATION.

7. *Filling in by agent of company — estoppel to impeach truth of answers.* An agent, authorized to take applications for insurance, should be regarded to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company and not to the assured. *State Ins. Co. v. Gray* (Kans.), 11, note.

8. When the agent thus authorized by his company to take applications for insurance, without the knowledge of the applicant, writes false answers to questions contained in the application, contrary to the directions of the applicant, who makes true answers to such questions, the company will be estopped by the answers thus written by its agent. *Ibid.*

9. *False statements inserted by fraud of company.* In an action on a fire policy it appeared that both the application and policy contained a stipulation that the assured should keep his books of account, inventories, etc., in an iron safe, which was not done, and they were destroyed in the fire. Plaintiff's evidence was that this stipulation was inserted in the application by the fraud of defendant, and that he did not know of its presence in the policy until the occurrence of the fire. Held, that a verdict for plaintiff would not be disturbed. *Liverpool & L. & G. Ins. Co. v. Morris* (Ga.), 11, note.

10. *Application filled up by agent from his own knowledge — effect of false statements.* Where a local agent of a fire insurance company furnishes a blank application to a party seeking insurance, and the agent himself, who has full and complete knowledge of all the facts, fills up the blanks and informs the applicant that the same is done correctly, and the applicant believes him and signs the application, and afterward a policy is issued thereon, and afterward a fire occurs, destroying all the insured property, held, that the company cannot then claim that the insurance policy is void because of inaccurate or incomplete statements in the application. *Phoenix Ins. Co. v. Weeks* (Kans.), 458, note.

11. *Oral application by insured — false statement to company by agent — effect.* Where an applicant for insurance signs no application, but tells the agent that there is a mortgage on the premises, and the latter, in his daily report, on which the policy is issued, states that there is no mortgage, the agent's knowledge is imputable to the company, and the policy is not avoided by the misrepresentation. *Gristock v. Royal Ins. Co.* (Mich.), 458, note.

12. *Parol evidence to vary written application.* Where an application for insurance has been reduced to writing, and the applicant has had an opportunity to read the same, but signs it without reading it, and there is no fraud practiced, and the applicant afterward receives the policy of insurance based upon

INSURANCE — FIRE — APPLICATION — *Continued.*

such application, and retains it for several months without objection, he cannot, in an action brought upon a note given for the premium on such policy, vary or contradict the statements in the written application by parol evidence. *Walker v. State Ins. Co. (Kans.)*, 458, note.

13. *Informal application by letter — whether a warranty.* Though the letter in which application for insurance was made stated that a certain amount of insurance would be maintained, still there being no reference in the policy to an application, and it being provided by the policy that if an application was referred to therein it should be a part of the contract and a warranty by the assured, it will be held that the policy was not issued on the condition that the amount of insurance named should be maintained. *Citizens' Ins. Co. v. Hoffman (Ind.)*, 459, note.

14. *Insured not bound to make disclosures except in answer to questions propounded.* Where the policy contains many questions as to facts deemed by the company material to the risk, the insured is bound to disclose only such matters as may be inquired about by the company. *Wytheville Ins., etc., Co. v. Stultz (Va.)*, 459, note.

15. *Disclosure as to matters not within knowledge of insured.* An instruction that the insured was bound to disclose every material fact which at the time of the issuance of the policy would have influenced the company in issuing or refusing it, or which would have induced the demand of a higher rate, is properly refused, as the insured must have knowledge of the existence of the fact or of its materiality before the policy can be avoided for his failure to disclose it. *Ibid.*

16. *In absence of application, condition of policy binding.* As a general rule where there is no application for insurance, the insured is bound by the conditions found in the policy which he has accepted and retained without objection. *McFarland v. St. Paul F. & M. Ins. Co. (Minn.)*, 459, note.

## ARBITRATION CLAUSE.

17. *Construction and waiver of.* A policy provided for arbitration as to the amount of loss, and gave the insurer the right to take the property insured at the value fixed by the arbitrators. The assured, after agreeing to arbitration, revoked the submission, and declined to be bound. He then had the goods appraised, and sold them. Held a forfeiture of the policy. *Morley v. Liverpool & London & Globe Ins. Co. (Mich.)*, 11, note.

18. A policy of fire insurance provided for an appraisal of each article damaged or destroyed by fire, which appraisal was to be submitted as part of the proofs of loss, and that, in case differences shall arise touching any loss or damage after proof thereof has been received, the matter shall be submitted to arbitrators, whose award in writing shall be binding on the parties as to the amount of the loss. Held, that where the company received proofs of loss from the insured, without objection either as to their form or substance, the refusal of the insured to submit to an award of arbitrators could not be pleaded in bar to an action on the policy, which did not contain any provision that no action should be maintained on it until after such award. *Hamilton v. Home Ins. Co. (U. S.)*, 11, note.

19. A provision in a policy that no action for a loss thereunder shall be

INSURANCE — FIRE — ARBITRATION CLAUSE — *Continued.*

maintained unless an award of damages by arbitrators, in case of a difference between the parties as to the amount of the loss or damage, shall first have been returned, does not necessitate as a condition precedent to the bringing of an action that there be a submission to arbitration, where the insurance company denies its liability to pay any sum. *Bailey v. Aetna Ins. Co. (Wis.)*, 12, note.

20. An arbitration clause in a fire insurance policy provided that the amount of loss should be determined by appraisers to be selected one by the company and one by the insured, and that their award should be binding and conclusive as to the amount of loss, but that no appraisal nor agreement for appraisal should be construed as an admission of the validity of the policy, or as a waiver of any of its conditions. Held, that the clause was valid, and in an action on the policy, where defendant had pleaded that the loss had been settled by arbitration, it was error to instruct the jury that the agreement to submit to arbitration and the award of the appraisers were not competent, either to support the plea of arbitration and award or as a binding agreement on the parties thereto. *Herndon v. Imperial Fire Ins. Co. (N. C.)*, 12, note.

21. Though a fire policy stipulates that in case of a failure to agree upon the amount of damage it shall be ascertained by appraisers, and that until the required proofs are produced and appraisals are permitted the loss shall not be payable, the assured having offered proofs of loss that are rejected by the company, which does not demand an appraisal nor dispute the amount of damage as shown in the proofs, may sue for the loss without himself first offering to have the property appraised, or requesting the appointment of appraisers. *Randall v. American Fire Ins. Co. (Mon.)*, 459, note.

22. The fact that adjusters, without authority from an insurance company, in making up proofs of loss, agree with the assured on a certain amount, is not a waiver by the company of a condition in the policy requiring the amount of loss to be ascertained by arbitration before suit. Where, however, such amount is included by the adjusters in the proofs of loss, and is sent to and retained by the company without objection, it thereby consents to the amount and waives the right to have the loss arbitrated. *Everett v. London & L. Ins. Co. (Penn.)*, 459, note.

## CONDITIONS, THEIR CONSTRUCTION AND EFFECT.

23. *Forfeiture by transfer of property.* A provision in a policy of fire insurance, to the effect that a sale or transfer of the property insured shall forfeit the policy, does not become operative to avoid the policy, unless the entire interest of the assured in the property insured is sold or transferred. *Blackwell v. Insurance Co. (Ohio)*, 172.

24. *Transfer of partial interest by taking in a partner.* If the property insured consist of the stock of goods of a merchant doing business alone, the taking in by him of a partner in the business is not such a sale or transfer by him of his entire interest in the property as will avoid the policy. *Ibid.*

25. *Stipulation for sole and unconditional ownership—waiver.* A policy of insurance was issued on an oral application and statement to the agent of the company. The agent knew that the legal title of the property stood in another person, and that the assured was only entitled to a deed on payment of

**INSURANCE—FIRE—CONDITIONS, THEIR CONSTRUCTION, ETC.—Continued.**  
 a certain sum. The policy contained the provision that it should be wholly void unless consent in writing was indorsed thereon by the company, if the assured was not the sole and unconditional owner of the property; or if the building intended to be insured stood on ground not owned in fee-simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, was not truly stated in the policy; or if any change take place in the title, interest, location or possession of the property, by sale, transfer or conveyance, in whole or in part. Held, that this provision applied only to such changes as arose after the policy had been delivered and accepted, and not to the condition of the property at the time the policy was issued. *Hoose v. Prescott Ins. Co.* (Mich.), 14, note.

26. *Vacancy — increase of risk.* Under Maine Statutes, chapter 49, section 20, to avoid a policy of fire insurance stipulating that, whenever the buildings insured shall become vacant, the insurance thereon shall cease, it must be shown that not only have the buildings become vacant in violation of the terms of the policy, but that the risk was thereby increased. *White v. Phoenix Ins. Co.* (Me.), 14, note.

27. Under the statute the burden is upon the insurance company to show an increase of risk; and, when the vacancy is shown, it has such presumption in its favor that, if not rebutted, is sufficient to prove the fact; but, when other facts appear, it is for the jury to say whether the presumption shall still prevail, or whether it has been rebutted, and whether, on the whole evidence, the risk is shown to have been increased. *Ibid.*

28. *Manufacturing establishment — ceasing to operate.* A building used as a shoe factory, the machinery and fixtures, and the stock of boots and shoes therein, were separately insured in different companies, under policies containing no reference to each other. In accordance with the "standard form" prescribed by Public Statutes of Massachusetts, chapter 119, section 189, each policy was conditioned to be void, "if the property insured was a manufacturing establishment, if such establishment ceased operation for more than thirty days," without written permission. Held, that a stoppage of machinery for four months, and discharge of employees, forfeited the policies on the building and machinery, although the insurance company knew it was usual thus to stop business in the dull season. *Stone v. Howard Ins. Co.* (Mass.), 460, note.

29. The policy on the stock of boots and shoes was not forfeited, since the property insured was not "a manufacturing establishment," or a part of one. *Ibid.*

30. A condition in a policy provided that if gasoline was used upon the premises the policy should be void. It was issued without inquiry, and without an application or any representations on plaintiff's part. Reasonable investigation would have disclosed that plaintiff was then using a gasoline stove, and the fire which subsequently destroyed the house was caused by an explosion of this stove. Held, that plaintiff could not recover on the policy. *McFarland v. St. Paul F. & M. Ins. Co.* (Minn.), 460, note.

31. *Storing hazardous articles — keeping gasoline and kerosene for sale.* Though gasoline and coal-oil may be articles of the class known as "extra hazardous," the keeping of them in reasonable quantities in a grocery store for the purpose of selling at retail, unless specifically prohibited in the policy,

INSURANCE—FIRE—CONDITIONS, THEIR CONSTRUCTION, ETC.—*Continued.*

will not avoid a contract of fire insurance, notwithstanding provisions in the policy that it shall be void if the premises are occupied in such a way as to increase the risk, or if used for the purpose of "storing" any article denominated "hazardous" or "extra hazardous." *Renshaw v. Missouri State Mut. F. & M. Ins. Co. (Mo.)*, 460, note.

32. *Vacancy for thirty days—computation of time.* Plaintiff filed an application for insurance with defendant's agent, and some time after, receiving notice that his policy was ready, called for it and paid the premium. There was no agreement that the policy should take effect before payment of the premium. Held, that the time between the application and payment of the premium cannot be considered in determining whether the premises were vacant for thirty days, contrary to a provision of the policy. *Wainer v. Milford Mut. Fire Ins. Co. (Mass.)*, 460, note.

33. *Change in the exposure—temporary location of steam engine.*—The use by the assured of a steam engine to operate a corn-sheller, near an insured corn-crib, is within the meaning of a clause in the policy that it shall be void "if there be any change in the exposure, by the erection or occupation of adjacent buildings or by any means whatever in the control or knowledge of the assured." *Davis v. Western Home Ins. Co. (Iowa)*, 460, note.

34. *Increase of risk—erection of addition by tenant.*—When a tenant, without the knowledge or consent of the assured, erects an addition to the building insured, such change does not avoid the policy, although it contains a provision that it shall be void and of no effect if the risk be increased by any means within the control or knowledge of the assured. *Nebraska & I. Ins. Co. v. Christensen (Neb.)*, 460, note.

35. *Manner of occupation—use of premises for purposes of prostitution.* The building insured was described in the policy as being occupied as a saloon. It was so occupied by a tenant at the time of the fire, as well as when the policy was issued. The fact that at the time of the loss the building was also used by the tenant for the purpose of prostitution does not invalidate the policy, when it appears that the premises were used for such illegal purpose without the knowledge or consent of the owner, and that the loss did not occur from such use. *Ibid.*

36. *Other insurance—knowledge of agent.* Taking out concurrent insurance beyond the amount allowed by a policy does not avoid the policy, when such concurrent insurance is taken out through the agent of the company that issued the policy. *Hagan v. Merchants & Bankers' Ins. Co. (Iowa)*, 461, note.

37. *Misrepresentation as to incumbrances on the property.* A fire insurance policy, conditioned to be void for misrepresentations in the application, is avoided by a gross under-statement of the amount of incumbrances. *O'Brien v. Home Ins. Co. (Wis.)*, 461, note.

## CANCELLATION.

38. *Notice of, on day of loss.* Where notice of the cancellation of insurance is given by the company on the very day of the fire, and the testimony is conflicting as to whether it was given before or after the fire began, it is proper to refuse to instruct the jury that, if notice was given on the day of the fire, such notice would terminate the risk, since such instruction takes from the



INSURANCE — FIRE — CANCELLATION — *Continued.*

jury the decision of the hour when the notice was given. *Karelsen v. Sun Fire Office* (N. Y.), 12, note.

39. *Binding slip — cancellation of — notice.* Where an insurance company gives to an applicant for insurance a "binding slip," whereby it agrees to insure the applicant's property, the slip to be binding until the policy is delivered, the company has the same rights as to cancellation of such slip as if it contained all the conditions as to notice and agency found in the company's ordinary policies. *Ibid.*

40. Where such policies provide that the company may cancel the insurance by giving notice, and that if any broker has procured such insurance he shall be deemed the agent of the insured, notice of cancellation to the broker who procured the insurance is sufficient, before the policy is delivered, to cancel the insurance evidenced by the "binding slip." *Ibid.*

## CONSTRUCTION OF POLICY.

41. *Permission to use for "any mercantile purpose."* Permission in a fire insurance policy to use the building for "any mercantile purpose," does not authorize its use as a restaurant. *Garretson v. Merchants & Bankers' Ins. Co.* (Iowa), 461, note.

42. *Loss by explosion — liability.* Where the indemnity provided for by a fire policy is against loss or damage by fire, without making any exception, a damage from an explosion will be covered by the policy, whether it result from an accidental fire gradually coming in contact with coal-oil or gasoline, or from an innocent fire, such as a gas-jet, purposely left burning, igniting the inflammable gas, mixed with atmosphere, which had escaped and filled the room. *Renshaw v. Missouri State Mut. F. & M. Ins. Co.* (Mo.), 461, note.

43. *Extent of risk.* A policy of insurance for \$1,500 on twenty-one different pieces of property gave an itemized statement of the pieces, with a sum of money following each item, amounting in all to \$90,000, and declared that the company only insured one-sixtieth part of each of said sums, and that it was only liable for such proportion of the loss as the amount insured thereby bore to the whole amount of insurance. The property was damaged by fire to the amount of \$51,000, the total insurance being \$60,000. Held, that the company issuing said policy was liable for one-fortieth of the loss. *Indiana Ins. Co. v. Hoffman* (Ind.), 461, note.

44. *Condition against incumbrances — divisibility of covenants.* Where an insurance policy covers a dwelling and different classes of personal property, describing them separately, and specifies distinct and separate amounts on the dwelling and each kind of personalty, the execution of a mortgage on the real estate, in violation of a condition against subsequent incumbrances on any of the property insured, is no defense to an action for the loss of the personalty. *German Ins. Co. v. Fairbank* (Neb.), 90.

45. When a policy is taken out on different classes of personal property for separate and distinct amounts, the violation of a condition of the policy against incumbrances, by the execution of a chattel mortgage on one class of property will not preclude a recovery upon the policy for the destruction of the property of another kind, not incumbered. *Ibid.*

## FORFEITURE, WAIVER OF.

46. *Knowledge of grounds of, essential.* There can be no waiver, in the ab-

INSURANCE — FIRE — FORFEITURE, WAIVER OF — *Continued.*

sence of a complete knowledge of all the circumstances; and the fact that the assured, during the life of the policy, notified the company that the premises were vacant, and received a reply that "that was all right," will not amount to an estoppel unless it also appears that the company was made aware that the house was vacant a month before the policy was issued, and had continued so ever since. *Boyd v. Vanderbilt Ins. Co. (Tenn.)*, 6.

47. Where, in addition to a defense growing out of a breach of warranty of occupation, the company claims an over-insurance, the fact that the assured is required to furnish, at some expense to himself, an estimate of his loss, and the value of the house destroyed, in accordance with the terms of the policy, will not amount to a waiver of the breach of warranty. *Ibid.*

48. Where the company indorses upon a policy its consent that it may continue in force, notwithstanding a temporary vacancy, this will not waive a forfeiture previously incurred, of which the company was ignorant. *Trott v. Woolwich Mut. Fire Ins. Co. (Me.)*, 14, note.

49. *Acts of agent requiring proof of loss, etc.* The forfeiture created by the breach of a condition in an insurance policy, prohibiting the use of gasoline in the building, is not waived because the company's agent, whose authority was limited to soliciting insurance, delivering policies and receiving the premiums, consented that the building might be used as a restaurant, which included the use of a gasoline stove, or because the agent required proof of loss at the expense of the insured without claiming the forfeiture. *Garretson v. Merchants & Bankers' Ins. Co. (Iowa)*, 463, note.

50. *Silence of company having knowledge of cause of forfeiture — other insurance.* Where the policy provides that the policy, unless otherwise provided by agreement indorsed thereon, shall be void if the insured shall thereafter procure any other insurance on the property, mere notice or knowledge on part of the insurance company that the insured has subsequently placed other insurance on it, or intends to do so, is not of itself a waiver or consent on part of the company, at least where the notice is not communicated in a manner implying a request for permission to do so, or so as to require the company to act upon it by either consenting or refusing to consent. *Goldin v. Northern Ass. Co. (Minn.)*, 463, note.

51. *Vacancy — waiver of condition as to.* The facts that an insurance agent was notified by an assured that the insured premises had become vacant and that assured would move in shortly, and said, "All right," and that he would fix the policy, do not constitute a waiver of a provision in the policy that it shall be void if the premises become vacant without written consent of the company, where the policy provides that "the use of general terms, or any thing less than a distinct, specific agreement, \* \* \* shall not be considered as a waiver of any \* \* \* condition," and there is no evidence of the agent's powers except that the policy was indorsed, countersigned and delivered by him. *Messelback v. Norman (N. Y.)*, 14, note.

## INSURABLE INTEREST.

52. *Purchaser under a parol agreement.* A tenant in common who has purchased the interest of his co-tenant and paid the consideration under an oral agreement, though he has not received a deed, has an insurable interest in the entire property. *Wainer v. Milford Mut. Fire Ins. Co. (Mass.)*, 461, note.

INSURANCE — FIRE — INSURABLE INTEREST — *Continued.*

53. *Husband's right of homestead in wife's property.* Where a husband conveys property to his wife, holding an insurance policy on the buildings, which provides that no loss shall be paid unless the assured or his assignee shall at the time of the fire have or hold a *bona fide* insurable interest in the property burned, either by ownership or as mortgagee, he cannot recover for a loss on the ground that the buildings were upon the homestead, and he thereby retained an insurable interest. *Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co.* (Mich.), 462, note.

54. *Beneficial ownership and possession under parol trust.* Plaintiff purchased a farm, with the buildings, paying for the same with his own money; and at his direction the deed was made to his wife, upon her agreement to reconvey to him at his request. Plaintiff had possession, and the entire beneficial use of the farm and buildings, using the same for the support of his family. Held, that he had an insurable interest in the buildings. *Horsch v. Dwelling-House Ins. Co.* (Wis.), 13, note.

55. *Husband insuring wife's property.* An insurance policy issued on a dwelling-house in the name of a husband, when the title was in his wife, the company not being informed that the husband was not the legal owner, is void. *Trott v. Woolwich Mut. Fire Ins. Co.* (Me.), 14, note.

## INTEREST.

56. Where by its terms a policy is payable sixty days after proof of loss, the insured, who has delivered proofs of loss that are rejected by the company because they contain a clause stating that the estimate of value was made by persons agreed upon, can recover interest from the date of the delivery of the proofs. *Randall v. Am. Fire Ins. Co.* (Mon.), 462, note.

## LIMITATION CLAUSE.

57. *Original summons quashed — alias summons after time limited.* An action on a policy of insurance conditioned that suit thereon shall be brought within a year is brought in time if the original summons is issued within a year, though it is afterward set aside and an *alias* summons issued after expiration of the year. *Everett v. Niagara Ins. Co.* (Penn.), 462, note.

58. *Waiver of, by company — acts held insufficient.* The acts of adjusters, without authority from an insurance company, and letters from the company to its own agent, denying liability, but informing him that to avoid litigation it would settle under certain conditions, are not sufficient evidence to warrant submission to the jury of the question of waiver by the company of a condition of the policy limiting the time within which suit should be brought. *Everett v. London & L. Ins. Co.* (Penn.), 462, note.

59. *Acts of waiver must be done within period limited.* To constitute a waiver by an insurance company of a condition in a policy limiting the time within which suit shall be brought, the act relied on must have been done during the period of limitation. *Ibid.*

60. *The words "six months after loss" construed.* Where a policy of insurance requires proofs to be furnished within thirty days, and the action to be commenced within six months after the loss, and it is further provided that the company will pay the loss ninety days after the notice and due and satisfactory proofs of the same shall have been made by the assured and received at the company's home office, held, that the cause of action did not accrue be-

INSURANCE — FIRE — LIMITATION CLAUSE — *Continued.*

fore the expiration of ninety days after proofs of loss are received; and an action brought on the policy within six months from that time is not barred. *German Ins. Co. v. Fairbank* (Neb.), 90.

## MORTGAGEE.

61. *How affected by defaults of mortgagor.* An insurance policy was issued with a provision that the loss, if any, should be paid to the mortgagee of the insured property, and that it should not be of any effect until the premium should be paid; and the policy was sent to the assured, at his request, with directions to remit the premium. The assured sent the policy to the mortgagee, but never paid the premium, of which failure the mortgagee had no notice. The policy contained a recital that the premium had been paid. Held, that the company was not estopped to set up such non-payment in an action by the mortgagee on the policy. *Union Bldg. Assn. v. Rockford Ins. Co.* (Iowa), 453.

## PARTIES, PLEADING, EVIDENCE, ETC.

62. *Time of bringing suit — when action accrues.* Where an insurance policy stipulates that the loss shall not be payable till sixty days after proof of loss, an action commenced fifty-eight days after proof of loss is premature, unless the company has absolutely refused to pay the loss. *Cascade Fire & M. Ins. Co. v. Journal Pub. Co.* (Wash.), 13, note.

63. Where a policy of insurance allows the company thirty days after proofs of loss are completed to rebuild or pay the loss, and the first proofs are returned to assured for corrections, which are made, the time begins from the receipt of the corrected proofs. *Kelly v. Sun Fire Office* (Penn.), 13, note.

64. A condition in a fire policy that a loss shall be paid "sixty days after due notice and proof of the same, made by the assured, are received at the office of the company," is waived by an absolute denial on the part of the company of any liability, and the assured need not wait sixty days before suing therefor. *California Ins. Co. v. Gracey* (Col.), 13, note.

65. *Complaint need not negative grounds of forfeiture.* Although the policy set forth in the complaint contains a provision that it shall be void if the premises become vacant, it is unnecessary to allege that they did not become vacant, as this is matter of defense only. *Butternut Mfg. Co. v. Manufacturers' Mut. Fire Ins. Co.* (Wis.), 463, note.

66. *Suit by mortgagor when loss payable to mortgagee.* A mortgagor's right to recover in his own name upon an insurance policy, in which the loss, if any, is made payable to the mortgagee as his interest may appear, depends upon his having paid the debt, or having, in some other proper manner, satisfied and discharged the incumbrance; or, possibly, he might recover by alleging in his complaint, and showing upon the trial, that the mortgagee had consented to and authorized a recovery by him. *Graves v. Am. Live-stock Ins. Co.* (Minn.), 463, note.

67. *Right of insured to maintain action on policy after taking partner.* Where the policy has not been assigned or transferred, and the property thus insured is destroyed or damaged by fire after the partnership had been formed and had assumed the management of the business, the assured may maintain an action on the policy in his own name to recover the damages sustained by him on account of the injury done to his share of the property. *Blackwell v. Ins. Co.* (Ohio), 172.

INSURANCE — FIRE — *Continued.*

## PROOFS OF LOSS.

68. *Necessity of furnishing proofs.* In an action upon a policy, which provides that the insured should furnish proofs of loss within a specified time after the loss occurred, it is necessary for the plaintiff to prove upon the trial that the proofs were made, or that the same were waived by the company. *German Ins. Co. v. Fairbank* (Neb.), 90.

69. *Waiver of formal proofs.* In an action on an insurance policy, it appeared that an adjuster of the company spent several days with the assured's son and agent in making a list of the personalty destroyed, and the two employed a builder to estimate the value of certain buildings, and referred to an arbitrator the value of a dwelling on which they could not agree. Held, that, if the adjuster's conduct would induce an honest belief that the proofs then being made were all the company required, and the assured did so believe, the jury might find that formal proofs were waived. *Gristock v. Royal Ins. Co.* (Mich.), 462, note.

70. *Denial of liability — effect as a waiver of proofs.* Where a fire insurance policy was issued by an insurance company, and afterward the insured property was destroyed by fire, and the company then denied all liability on the ground that the policy was void, held, that by this denial the company in effect waived all its rights under certain stipulations in the policy requiring proofs of loss to be made, and giving the company sixty days thereafter within which to pay the loss; and a suit brought on the policy within less than the sixty days is not prematurely brought. *Phoenix Ins. Co. v. Weeks* (Kans.), 462, note.

71. *Procuring certificate of magistrate or notary.* Where the policy requires the assured to procure the certificate of a magistrate or notary, nearest the fire, not concerned in the loss or related to assured, stating that he has examined the circumstances and believes the loss to be without fraud, the condition is reasonable, and must be complied with, if possible. *Kelly v. Sun Fire Office* (Penn.), 96, note.

72. *When nearest notary an employe of company — refusal to certify.* Where the nearest notary was in the employ of the company, and refused to furnish a certificate of actual loss without fraud, as required by the policy, and the certificate was furnished by another notary, Civil Code of California, section 2687, providing that the insured should "furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified," did not require plaintiff to send, to the company, evidence that the nearest notary was in their employ. *Noone v. Transatlantic Ins. Co.* (Cal.), 96, note.

73. *Including articles not belonging to assured — fraud.* The fact that assured in her proofs of loss included some articles that were not her property did not invalidate the policy, where no fraud was intended, and she supposed the articles were included in a clause of the policy. *Tubbs v. Dwelling-House Ins. Co.* (Mich.), 96, note.

74. *Waiver of defects or delay.* Where proofs of loss are sent to an insurance company immediately after a fire, and are retained by it for nearly two months, without any objection being made to them, it is a question for the jury whether the company thereby waived any defects in them or not. *Davis Shoe Co. v. Kattanning Ins. Co.* (Penn.), 96, note.

INSURANCE — FIRE — PROOFS OF LOSS — *Continued.*

75. Where the insurer, in response to notice of loss, sent to the insured a blank, apparently designed to be used in making proof of loss, and the insured so used it, filling it up with all the particulars of the loss of which the blank admitted, and sent it to the insurer, who returned it without objecting to its sufficiency, the insurer will be held to have waived the objection that it was not itemized with the detail required by the policy. *Bromberg v. Minnesota Fire Assn. (Minn.)*, 96, note.

76. *Unreasonable delay.* A petition on a fire policy containing a stipulation that the assured shall render a particular account of the loss under oath, as soon as possible after its occurrence, is insufficient when it avers a general compliance with all the conditions of the policy, and also that the loss occurred in August, and that proof of it was furnished in December, for such unexplained delay is unreasonable, and not a compliance with the policy. *Baker v. German Fire Ins. Co. (Ind.)*, 96, note.

77. *Proofs of loss as evidence of value.* The proof of loss made to the company after the fire is not evidence of the value of the property; and, where such proof is the only evidence of the value of the property, there is nothing for the jury to decide. *Cascade Fire, etc., Ins. Co. v. Journal Pub. Co. (Wash.)*, 97, note.

78. *Proofs by partnership—giving individual names.* Where insurance is issued to a copartnership in the firm-name, proof of loss in such name is sufficient, though it does not give the name of any of the partners except one who signed the proof with the firm-name, and added thereto his individual signature, with the word "treas." following it. *Karslsen v. Sun Fire Office (N. Y.)*, 97, note.

## REPRESENTATIONS AND WARRANTY.

79. *Description in policy as to occupancy.* Where on the face of a fire policy, the property is described as a dwelling-house occupied by tenants, such a statement is a warranty, and becomes a part of the contract, and the assured cannot recover for a loss, unless it is true. *Boyd v. Vanderbilt Ins. Co. (Tenn.)*, 6.

80. *Representation as to distance of nearest building.* In an application for insurance, covenanting that the representations therein were true so far as "known to the applicant and material," plaintiff represented her building as ninety feet from the next nearest, without knowing the exact distance to be seventy-two feet. Held, that such statement was not a warranty, although the policy provides that the application shall be considered a part thereof, "and a warranty by the assured." *Noone v. Transatlantic Ins. Co. (Cal.)*, 18, note.

81. *Representation, whether a warranty—statute construed.* Although the Civil Code of California, section 2607, provides that "a statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof," yet, where it appears from the whole policy that such an expression was not intended as a warranty, it will not be held to be such; and where the policy recites that "it is understood and agreed that the within-described premises have been leased by \* \* \* and it turns out that the premises were not then so leased, though they had previously been, the policy is not avoided, it appearing that there was no intentional misstatement by the assured. *National Bank v. Union Ins. Co. (Cal.)*, 18, note.

INSURANCE — FIRE — REPRESENTATIONS AND WARRANTY — *Continued.*

82. A statement in the policy that the building is occupied in a certain way is a warranty that it is occupied in that way at the time that the contract is entered into, and the fact that it was not so occupied at that time is a good defense to the action. *Baker v. German Fire Ins. Co. (Ind.)*, 13, note.

## WAIVER OF CONDITIONS.

83. *Provision as to prepayment of premium.* A clause in a policy of fire insurance, providing that "the company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof shall be actually paid," may be waived by the company. *Nebraska & I. Ins. Co. v. Christensen (Neb.)*, 463, note.

84. *Issuing policy with knowledge of existing incumbrances.* Where a stipulation in a policy provides that the company shall not be liable "if the property \* \* \* is or shall become mortgaged without the assured's written notice to, and without the written permission of, this company indorsed on the policy," and the assured signed no written application, but told the agent that there was a mortgage on the premises, delivery of the policy to the assured, without an indorsement of permission and without calling his attention to the conditions respecting the incumbrance, operates as a waiver thereof by the company. *Gristock v. Royal Ins. Co. (Mich.)*, 463, note.

## INSURANCE — LIFE AND ACCIDENT.

1. *Accident insurance — whether death by asphyxiation within policy.* Deceased descended into the dug-out portion of a driven well to repair a pump, and in a few minutes he died from *asphyxia*, due to some deadly gas therein. This dug-out portion was but ten or twelve feet deep, and deceased had no reason to suspect the presence of noxious gas therein. Held, that his death was due to external, violent and accidental injuries, within the meaning of an accident policy insuring against that class of injuries. *Pickett v. Pacific Mut. Life Ins. Co. (Penn.)*, 143.

2. *Death due to "the inhalation of gas" — policy construed.* His death from such cause is not due to "the inhalation of gas," within the meaning of the terms of the policy, excepting death so caused from its indemnity, for such exception has reference only to a voluntary inhalation of gas. *Ibid.*

3. *Death through external, violent and accidental means.* Where the insured died from the effects of a blow struck by a person after an attempt to blackmail, such death is the result of accidental means within the general terms of a policy providing against injuries or death caused through "external, violent and accidental means." *Richards v. Travelers' Ins. Co. (Cal.)*, 149, note.

4. Where a person, injured in an accident resulting in hernia, dies after a dangerous and unsuccessful surgical operation resulting in peritonitis, performed when death seemed inevitable without it, the accident is the proximate cause of his death. *Travelers' Ins. Co. v. Murray (Col.)*, 149, note.

5. An accident insurance policy, insuring against death "from bodily injuries effected through external, violent and accidental means," but excepting death from hernia, does not relieve the insurer from liability where death results from hernia caused by "external, violent and accidental means." *Ibid.*

6. *Death resulting from a blow inflicted — whether death from design within policy.* Where, in an action on an accident policy providing that the insur-

INSURANCE — LIFE AND ACCIDENT — *Continued.*

ance shall not extend to any cause of death unless the claimant shall establish by positive proof that the death was not the result of design, either on the part of the insured or of any other person, it appearing that the insured died from the effects of a blow struck by another person, it is not error to charge that if the death of insured was caused by a blow dealt him, that would not prevent recovery if the person inflicting the blow did not mean to kill the insured. *Richards v. Travelers' Ins. Co. (Cal.)*, 149, note.

7. *Exceptions in policy—death caused by fighting.* Where two parties engage willingly in a personal encounter, it is a mutual combat or fight, and death resulting therefrom is not included in a policy of accident insurance which excepts from the risk death or injury which may have been caused by fighting. It makes no difference, in such case, whether the slayer was sane or insane. *Gresham v. Equitable Life & Acc. Ins. Co. (Ga.)*, 149, note.

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW; CHARGES, REGULATION OF.

INTERSTATE LAW.

1. *Decision of another state as to the common law not binding.* The decisions of the supreme court of Tennessee, as to what is the common law as applied to drafts sent to banks for collection, are not binding on the courts of New York, even in actions on such contracts made in Tennessee. *St. Nicholas Bank v. State Nat. Bank (N. Y.)*, 97.

2. *Contracts between banks of different states as to collections.* Where a draft was sent to a bank in pursuance of a general contract between it and the owners, who reside in another state, that it should collect paper sent it, for an agreed compensation, it cannot be held, in the absence of any evidence, that the contract to collect the particular draft was made in the state where the bank is situated. *Ibid.*

3. Nor can the contract be regarded as subject to the law of that state, on the ground that it was to be performed there, when the draft was to be collected in the third state, and paid to the owner in the state of his residence. *Ibid.*

IRRIGATION.

1. *Irrigation districts—validity of statute authorizing.* The statute of 1887 (Cal.), page 29, which provides for the organization and government of irrigation districts, is for a public purpose and within the constitutional power of the legislature to make laws for the welfare of the state. In re Bonds of Madera Irrigation District (Cal.), 288.

2. *Whether statute providing for irrigation districts is special legislation.* The constitutional provision that "corporations for municipal purposes shall not be created by special laws," does not prevent the legislature from authorizing by general laws, the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization only in certain portions of the state, or from providing, by different general laws, for the organization of such and so many species of public corporations as in its judgment are demanded by the welfare of the state. *Ibid.*

3. *Proceedings to organize district—sufficiency of bond accompanying petition.* The board of supervisors petitioned to organize an irrigation district is sole judge of the sufficiency of the bond accompanying such petition. *Ibid.*



IRRIGATION — *Continued.*

4. *Sufficiency of petition — description of boundaries.* The provisions that the petition shall particularly set forth and describe the boundaries of the district sought to be organized does not require that they shall be described with more particularity than would be necessary in an act of the legislature creating a particular district or a municipal corporation. *Ibid.*

5. *Evidence on hearing to determine sufficiency of proceedings.* Act March 16, 1889 (Stat. 1889, p. 212), section 5, provides for a hearing in court to examine and determine the legality and validity of the proceedings had for the organization of irrigation districts, and the legality of the bonds to be issued, and the sale thereof. Section 2 provides that the "petition shall state facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized," etc. Section 4 provides: "The provisions of Code Civil Procedure respecting the answer to a verified complaint shall be applicable to the answer of said petition," etc. A petition under said statute alleged that the petitioner was duly organized, etc., and the answer thereto denied that any of the steps required for the organization were taken. Held, that as it was the duty of the court to determine the legality of the organization, the record of the board of supervisors that there was evidence, to the satisfaction of the board, on the question whether there were the required number of *bona fide* freeholders within the boundaries of the proposed district who had signed the petition, was incompetent evidence to show the legality of the proceedings. *Ibid.*

6. *Defective order in reference to issuance of bonds.* The proceedings for the organization were not defective, though the order for the issuing the bonds did not conform strictly to the statute, since the statute may be followed by the board of directors when issuance by them becomes necessary. *Ibid.*

## LIMITATION.

See BANKS, 30; FORFEITURE, 7; INSURANCE, 57, 64; RAILROADS, 89, 61-63.

## MANDAMUS.

1. *General rule as to granting writ.* A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings or in running its trains can be issued only when there is a specific legal duty on its part to do that act, and a clear proof of a breach of that duty. *Northern Pac. R. Co. v. Territory of Washington* (U. S.), 353.

2. *Practice — in whose name suit should be brought.* A *mandamus* to compel a railroad company to erect and maintain a station at a certain place, and stop its trains there for the accommodation of the public, founded upon an alleged breach of public duty required of it by law, is properly brought in the name of the state at the relation of the prosecuting attorney of the county in which the place is located. *Ibid.*

See WATER COMPANIES, 2.

## MEETINGS.

1. *Meetings of directors — notice.* Where there is no provision in the statutes, or in the by-laws of a corporation, for the holding of regular or special meetings of the directors, or for giving notice of meetings, there cannot be a legal meeting of the directors without personal notice to each director. *Bank of Little Rock v. McCarthy et al.* (Ark.), 520.

MEETINGS — *Continued.*

2. The code (Mansf. Dig., § 5206) providing for notice by leaving a copy thereof at the usual place of abode of the person to be served applies only to notices required by the code and not to notices to directors of corporations, and a meeting held upon such notice to an absent director is invalid. *Ibid.*

3. *Notice of meetings.* Necessity of notice. Stated and special meetings. 528, note.

4. Of the manner of giving notice and what it should contain. 530, note.

5. Waiver of notice. 532, note.

6. When failure to notify does not vitiate. Effect of absence or removal. 533, note.

7. Presumption as to notice and regularity of meeting. 535, note.

8. Adjourned meetings, notice of. 535, note.

9. *Quorum* In absence of statute or by-law, majority constitutes a quorum. 528, note.

## MUNICIPAL CORPORATIONS.

## ACCIDENT CASES.

1. *Liability generally for defects in streets and sidewalks.* 49, note.

2. *Duty generally in regard to keeping streets in safe condition.* 50, note.

3. *What constitutes a defect. Barrier about excavation.* Plaintiff was a conductor of an open horse-car, and while standing on the running-board thereof, collecting fares, was injured by a barrier planted in the street by the city authorities, close to the rails, as a guard, where the street had caved in. Held, proper to charge that, if the barrier was reasonably necessary to protect the public, and its position was indicated by sufficient lights, it was not a defect for which the city would be liable, no matter how near it came to the track; but that if it was not necessary, or was carried too far into the street, or was so constructed as to be a danger rather than a safeguard to public travel, or if the danger had been ended long enough to have reasonably enabled the barrier to be removed, then it was a defect. *Powers v. City of Boston (Mass.)*, 46.

4. *Abrupt descent in sidewalk.* Where the evidence shows that there was an abrupt descent in the grade of the sidewalk, variously estimated by the witnesses at from nine to fifteen inches, it was properly left to the jury to say whether this constituted a dangerous sidewalk, so that it was negligence on the part of the borough authorities to permit it to remain in that condition. *Readdy v. Borough of Shamokin (Penn.)*, 50, note.

5. *Hydrant in sidewalk.* A city is liable for injuries received by one, through no fault of his, in stumbling over a hydrant owned by a private company which the city has allowed to be maintained on the sidewalk in a position dangerous to travelers. *King v. Oshkosh (Wis.)*, 50, note.

6. *Overflow of sidewalk from obstructed gutter — absence of lights or guards.* In an action against a village for personal injuries occasioned by plaintiff's overstepping in the dark, the sidewalk, which was covered with water, and falling into the gutter, it appeared that the street commissioner had on that day cleaned out the gutter, which was filled with ice and snow, but had failed to remove the obstruction which prevented the water from flowing into the sewer, and that there were no lights or guards at the place. Held, that the evidence tended to establish negligence on the part of defendant. *Bly v. Whitehall (N. Y.)*, 51, note.

MUNICIPAL CORPORATIONS — ACCIDENT CASES — *Continued.*

7. *Abrupt termination of sidewalk — absence of light or guards.* In an action against a city for personal injuries, a petition which alleges that the sidewalk was twelve feet wide, but that where it crossed a ditch its breadth was reduced to three feet, and that plaintiff, without knowledge of this narrow place, walked into the ditch in the dark, there being no protection, lights or danger signals, and was injured, states a good cause of action. *Portland v. Taylor* (Ind.), 51, note.

8. *Depressed roadway — frightened horse — running vehicle upon sides.* A city is not liable to a person who, while driving on a street eighty-four feet wide, the center forty feet of which are twelve or eighteen inches lower than the twenty-two feet on each side, is thrown from his wagon because of his horse shying and making the wheels strike one of the elevated sides. *Johnson v. Philadelphia* (Penn.), 51, note.

9. *Rubbish deposited by overflow of defective culvert.* Where it appears that a horse's leg was broken by stepping on a brick washed into the street by the overflow from a defective culvert, it is error to instruct that defendant is not liable, for the reason that such an injury could not have been foreseen and apprehended as a result of the insufficient capacity or lack of repair of the culvert. *Hazard v. Council Bluffs* (Iowa), 51, note.

10. *Overflowed highway — driving into hole concealed by the water.* In an action against the town for the death of plaintiff's intestate, it appeared that she was riding as a stage passenger in the buggy of the mail carrier on his first trip for the season, and was thrown out and drowned by the upsetting of the buggy caused by a hole in the road, which was submerged by an overflow from a neighboring creek; that though the morning was stormy, and the water rising, the road was to all appearances safe, and the bridge, which they were carefully approaching, was all right. Held, that the evidence sustained a general verdict for the plaintiff, and a special verdict that the driver was not guilty of negligence. *Wiltse v. Town of Tilden* (Wis.), 51, note.

11. *Stairway in sidewalk.* A stairway in a sidewalk leading to a cellar, which is protected by a railing on two sides and is open on another, is not necessarily a defect in the walk, and it is error so to instruct the jury. *City of Franklin v. Harter* (Ind.), 51, note.

12. *Defects caused by ice and snow.* When the city authorities fail to clean out a gutter which they know to be obstructed, and, in consequence, the water from melting snow flows upon the sidewalk and freezes there, the city is liable to a person injured by slipping on the ice thus formed. *Gaylord v. New Britain* (Conn.), 53, note.

13. *Sidewalk outside of line of highway — liability for defect therein.* A municipality which causes a sidewalk to be built, or assumes control of it, is bound to keep it in repair, although it may not be within the line of a public street. *O'Neill v. Village of West Branch* (Mich.), 52, note.

14. *Street laid out but abandoned — defects therein.* In an action for injuries from a defective highway, it appeared that the place where the accident occurred in defendant village had been laid out as a street eighteen years before but that it had never been opened and worked as a street, and that eleven years before a fence was built across it, and that from that time it began to be dug away and the excavation was continued in some places to the depth of

MUNICIPAL CORPORATIONS — ACCIDENT CASES — *Continued.*

fifty feet below the surface. During all that time it had been impassable for teams. Held that, not having been opened and worked within six years after it was laid out, it ceased to be a road for any purpose whatever under Laws of New York, 1861, chapter 811, and that defendant owed plaintiff no duty to keep it in repair. *Hovey v. Village of Haverstraw* (N. Y.), 52, note.

15. *New bridge substituted for old one taken by railroad—defects therein.* Where a public road crossing a creek is taken for a railroad, and the railroad company, thereupon, builds a bridge across the creek as a substitute for such road, and the bridge is accepted as such by the county commissioners, it becomes the duty of the township authorities to keep the approach to such bridge in safe condition. *Dalton v. Upper Tyrone* (Penn.), 52, note.

16. *Defect outside of traveled way—liability.* Where a culvert or bridge covered with gravel had faced abutments extending beyond and outside of the rails which marked the traveled part, the town is not liable to a traveler who, to aid his servant, who has fallen into the water, knowingly passes beyond the traveled part at a point where the rails are down, and while using due care himself falls from the bridge, the town in such case not being bound to repair beyond the traveled way, and the absence of the rails not contributing to the injury. *Harwood v. Oakham* (Mass.), 52, note.

17. *Notice of claim.* Sufficiency of notice under particular statutes. 54, note.

18. *Notice to the municipality of the existence of the defect.* 55, note.

19. *Necessity of and what constitutes sufficient notice.* 55, note.

20. *Statute providing for joint action against the city and the person causing the defect.* The charter of the city of Sheboygan (Laws Wis. 1874, chap. 236) provides that, where a personal injury has happened through a defect in a street caused by the negligence of a third person, the city shall not be liable until all remedies against the negligent person have been exhausted. A subsequent general act (Laws Wis. 1899, chap. 471) provides that, where an injury "has happened" as above described, the negligent person shall be primarily liable, but the city may be joined as defendant with him, and judgment shall be entered against all parties found liable; but further action against the city shall be stayed until an execution against the negligent person has been returned wholly or partially unsatisfied. Held, the general statute, though retroactive, affects a remedy only, and, therefore, applies to an injury for which suit was pending when it was enacted. *Raymond v. Sheybogan* (Wis.), 57, note.

21. *Statute exempting city from liability for misfeasance or non-feasance of its officials.* Laws of New York, 1878, chapter 863, title 19, section 27, exempting the city of Brooklyn from liability for any misfeasance or non-feasance of the common council or of any of the city officials in the discharge of any duty imposed on them as officers, does not relieve the city from liability for failure to discharge any of its corporate functions, one of which is the duty of keeping its streets in repair; and the commissioner of city works and his subordinates, who are placed in charge of the streets, subject to the direction of the common council, must be treated as mere instrumentalities created to perform for the city its corporate function, for whose negligence it remains liable. *Bielling v. Brooklyn* (N. Y.), 57, note.

MUNICIPAL CORPORATIONS — ACCIDENT CASES — *Continued.*

22. *Defenses.* The absence of funds with which to make repairs is no defense. *New Albany v. McCulloch* (Ind.), 50, note.

## INCURRING DEBT.

23. *Creating debt beyond constitutional limit — purchase of electric light plant on monthly installments.* A city, indebted up to the limit fixed by the constitution, cannot carry on its operations upon credit, within the meaning of credit in the constitution, in any manner or for any purpose, but must pay during the current year with funds in hand, or with funds already legally levied. *Spillman v. City of Parkersburg et al.* (W. Va.), 370.

24. A city thus indebted cannot increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant; and, such indebtedness being forbidden, the contract out of which it arises, although executory, is also forbidden. The end aimed at is prohibited, which carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment. *Ibid.*

## LIABILITIES.

25. *Liability for negligence of city jailer — respondeat superior.* When one is confined in a city jail on a criminal charge, and is assaulted by other prisoners confined in the same room, he cannot hold the city liable for such assault, on the ground of the negligence of its officers in not taking proper measures to protect him. *Davis v. City of Knoxville* (Tenn.), 169.

26. *Injury to prisoner by fellow prisoner — liability.* A municipal corporation is not liable for personal injuries sustained by one prisoner at the hands of another confined in the same cell or room of the city prison, notwithstanding the police officer who arrested the plaintiff, and put him in prison, may have been guilty of wrong or negligence in confining him with an intoxicated fellow prisoner, who was on that account violent and dangerous. *Wilson v. City of Macon* (Ga.), 171, note.

27. *Liability for death of prisoner by burning of jail through negligence of its officers or agents.* A town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein by town authority for a violation of its ordinances, though such fire was attributable to the wrongful act or negligence of the officers or agents of the town. *Brown's Admr. v. Town of Guyandotte* (W. Va.), 171, note.

28. *Injuries resulting from unhealthy condition of jail.* The care and control of prisons being within the "police power," a county is not liable for the failure of its officers to keep the county jail in a healthy condition. *Board of Coms. v. Boswell*, 171, note.

29. *Defective drainage of school building — liability of city for damage to adjacent property.* A city is liable for damages occasioned by the negligent plumbing and drainage of a school building, whereby water and filth is deposited in the neighboring cellars. *Briegel v. Philadelphia* (Penn.), 171, note.

30. *Distinction between corporate and public duties as affecting liability for wrongs of officers and agents.* A municipal corporation is not generally liable for the wrongful act of an officer, and, in the few cases where it may be liable, it must be made to appear that such officer was not an independent public officer, and that the wrong complained of was done by such officer while in the legitimate exercise of some duty of a corporate nature, which was devolved

MUNICIPAL CORPORATIONS — LIABILITIES — *Continued.*

upon him by law, or by the direction of the corporation. *Caspary v. City of Portland (Oreg.)*, 172, note.

## POLICE REGULATIONS.

31. *Compelling abutting owners to remove filth from private way.* Under the general authority to promote the health and good order of the community a city may lawfully ordain that "no owner or occupant of land abutting on a private way, and having the right to use such way, shall suffer any filth," etc., "to remain on that part of the way adjoining such land." *Commonwealth v. Cutter (Mass.)*, 675.

32. The fact that, in order to keep the way free from refuse matter, the owner or occupant might be obliged to remove matter he had no agency in depositing there, does not render the ordinance unreasonable, or impose duties which cannot lawfully be enforced. *Ibid.*

33. *Power to compel abutter to remove snow and ice from sidewalk.* The city of St. Louis, under its charter, may require abutting owners by ordinance to remove snow and ice from the sidewalk in front of their property, and may enforce the same by penalty, and such an ordinance is a valid exercise of the police power. *City of St. Louis v. Connecticut Mut. Life Ins. Co. (Mo.)*, 202.

34. *Failure of abutter to comply with ordinance — liability over to city for damages resulting.* The violation of such an ordinance does not make such owner liable to the city for damages paid by it to one who received injuries by reason of the property-owner's failure to keep his sidewalk clean. *Ibid.*

35. *Ordinance prohibiting the repair of frame buildings partially destroyed by fire.* The owner of a valuable wooden building has the right to repair it, whether such repairs will cost \$300 or more; and an ordinance of the city of Mt. Vernon, which prohibits the erection or repair of a wooden building within the fire limits of the city, when such erection or repair will cost \$300 or more, is invalid so far as it relates to a building, the expenditure of \$300 as repairs on which would not be a substantial rebuilding thereof. *First Nat. Bank v. Sarlls (Ind.)*, 77.

36. *Fire limits.* Power to establish. 90, note.

37. *Ordinance regulating the manufacture and sale of bread — validity.* An ordinance of the city of Detroit, which provides that bread shall be manufactured into loaves of one, two or four pounds (and no other), and prohibits the sale of bread deficient in weight, does not authorize the seizure of short-weight bread, and the prohibition is not a taking of private property without compensation. *People v. Wagner (Mich.)*, 87.

38. The provision of the charter of Detroit empowering the common council to direct and regulate the weight and size of loaves of bread, and the inspection thereof, confers ample authority for passing the ordinance, and such a regulation is within the police power of the state, and the ordinance is reasonable and valid. *Ibid.*

39. *Prohibitory ordinance as to storage of oils vesting arbitrary discretion in common council.* A city ordinance prohibiting the storage by any person within the city limits of inflammable oils, except upon permission from the common council, leaving it to the common council to say whether a particular place is suitable for the purpose, or a particular person is a proper one to

MUNICIPAL CORPORATIONS — POLICE REGULATIONS — *Continued.*

whom to grant permission, and allowing the permission to be revoked at the will of the council, is invalid, because of the power of arbitrary discrimination it vests in the council. *City of Richmond v. Dudley* (Ind.), 110.

## POWERS.

40. *Power to erect and maintain electric light plant for public and private lighting.* Municipal corporations have inherent power, independent of powers expressly granted, to furnish light for their streets, alleys and public places, and having power to erect and maintain a plant for this purpose it may, at the same time, supply light for private consumption. *City of Crawfordsville v. Braden* (Ind), 221.

41. The furnishing of electric light for private use may also be justified as a legitimate exercise of the police power for the preservation of property and health, as the same does not vitiate the air and is not liable to set fires. *Ibid.*

42. A municipal corporation having no express power on the subject except to light the streets, alleys and other public places, held authorized by virtue of this and its inherent powers, to construct and maintain an electric light plant for lighting the streets, alleys and public places and furnishing light to private houses and places of business. *Ibid.*

43. *Mode of exercising powers — resolution or ordinance.* Where a city council has power to act in a given case, and the mode of action is not prescribed by charter, it may proceed either by resolution or by ordinance. *Ibid.*

44. *Power to furnish water or light for private use.* 232, note.

45. *Granting exclusive rights.* Power to do so considered. 740, note.

46. *Time contracts.* Power to make time contracts for water or light. 740, note.

47. *Dock lines.* Power to establish. *Grand Rapids v. Powers* (Mich.), 490.

## ORDINANCES.

48. *Two ordinances construed as one.* Where a city council on the same day passes two ordinances, the one providing for widening a certain street, and the other granting a railroad company a right of way on the street as widened, and requiring it to pay the expense of condemning the land necessary for widening the street, as provided for in the other ordinance, the two ordinances will be treated as if they were a single ordinance. *Ligare v. City of Chicago* (Ill.), 176.

49. *Title of ordinances.* The constitution of Michigan, relating to the title of laws, does not apply to city ordinances; and an ordinance of the city of Detroit, entitled "An ordinance relative to the manufacture and selling of bread," is not objectionable on the ground that matters contained within the body of the ordinance are not within the title. *People v. Wagner et al.* (Mich.), 87.

50. *Indefiniteness.* An ordinance is not indefinite because it attaches a penalty, if one "shall suffer any filth \* \* \* to remain" in a private way, instead of providing a time beyond which it should not be allowed to remain. *Commonwealth v. Cutter* (Mass.), 675.

See BONDS, 1-4; CONTRACTS, 9, 10; EMINENT DOMAIN, 1, 8, 9; INJUNCTION, 1-4; IRRIGATION: NEGLIGENCE.

## NEGLIGENCE.

## CONTRIBUTORY.

1. *Blindness of plaintiff.* In an action for injuries caused by falling into a cellar-way in defendant's sidewalk, alleged to have been negligently left open, the fact that plaintiff was blind does not authorize the conclusion that he was guilty of contributory negligence, against an allegation in the complaint that he was free from fault. *City of Franklin v. Harter* (Ind.), 52, note.

2. *Familiarity with street in which the defect exists—imperfect sight.* Where plaintiff had crossed the bridge safely several times on the day of the accident and he testified that his eye-sight was not good, that it was dark when the accident occurred, and that he had never seen the hole which constituted the defect complained of, it is proper to leave the question of contributory negligence to the jury. *City of Sherman v. Nairey* (Tex.), 52, note.

3. *Breaking through bridge—unusual load.* In an action against a county for an injury to plaintiff's team and threshing outfit, caused by the breaking of a bridge while attempting to drive across, it is for the jury to determine whether the use which plaintiff was making of the bridge was unusual and extraordinary, and such as the county was not bound to anticipate; and it is error for the court to decide this question, and to direct a verdict in the county's favor. *Tordy v. Marshall County* (Iowa), 52, note.

4. *Failure to observe defect in sidewalk.* Plaintiff, traversing a sidewalk in the evening when it was still light enough to recognize acquaintances across the street, struck her foot against the planks of a street crossing, which was raised somewhat above the pavement, and was injured by her consequent fall. She testified that she "didn't pay any attention to the pavement. \* \* \* Wasn't looking or thinking of any thing; only walking along." Held, she did not exercise reasonable care, and had no right of action against the city. *Robb v. Borough of Connellsville* (Penn.), 52, note.

5. *Knowledge of defect.* Where plaintiff was injured by reason of a defect in the sidewalk, the fact that she knew the condition of the walk before the accident does not of itself bar recovery, but is a circumstance to be considered by the jury with the other facts bearing on the question of contributory negligence. *City of Columbus v. Strassner* (Ind.), 52, note.

6. Where the evidence of the plaintiff proves that the plaintiff, in passing along the street of a town on a dark night, without a lantern or other light, fell over a rock in the middle of the street, and injured herself, when she knew that both the street and sidewalk were out of repair, dangerous and obstructed by dirt, rocks and building material, she will be held to be guilty of contributory negligence, notwithstanding the town authorities neglected to indicate said obstructions by beacons or danger signals, as it was their duty to do. *Hesser v. Grafton* (W. Va.), 52, note.

7. *Going upon an overflowed sidewalk in night.* Where the plaintiff was injured by stepping from an overflowed sidewalk into the gutter, and the evidence showed that he had a child in his arms and was proceeding cautiously at the time and that it was dark, it was held that the evidence sustained a finding that the plaintiff was not guilty of contributory negligence. *Bly v. Village of Whitehall* (N. Y.), 52, note.

8 *Runaway horse carrying plaintiff into defect.* Where, in an action



NEGLIGENCE — CONTRIBUTORY — *Continued.*

against a township for an accident alleged to be caused by a defect in the highway, the evidence shows that plaintiff's horse ran away, and thus carried him to the defective spot, it is proper to allow the case to go to the jury. *Wagner v. Jackson* (Penn.), 52, note.

9. *Drunkenness.* Where plaintiff was injured by falling upon a defective sidewalk, which a person using ordinary care could pass over in safety, the fact that plaintiff was drunk at the time will support a finding of contributory negligence. *McCracken v. Village of Markesan* (Wis.), 52, note.

10. *Breaking down of bridge — plaintiff's knowledge of age of bridge, etc.* Where plaintiff was injured by the breaking down of a bridge, owing to decayed timbers, the facts that he knew the age of the bridge and that some of the timbers had decayed and been removed, and that he could have reached his destination by another, though longer, route, do not tend to show contributory negligence. *Apple v. Marion County* (Ind.), 53, note.

11. *Falling into area opening in sidewalk — failure to see the opening.* In an action for injuries caused by falling into an area-way while walking along the sidewalk, it appeared that the area was not guarded, and there was nothing to call plaintiff's attention particularly to it; but it was plainly visible, and could have been observed on looking at it. Above the opening was an attractive show window. Plaintiff was looking at the window, and, in going over to it, fell into the opening. Held, that an instruction that plaintiff was bound to "use his eyes, and look where he was walking, and avoid all obstacles which were dangerous in their character, and were plainly visible and not obscured," was error, since, the facts being undisputed, it, in effect, decided as a matter of law that plaintiff was negligent in not seeing the opening, though his eye was attracted by the window, and there was nothing to call attention to the opening. *Mathews v. Cedar Rapids* (Iowa), 53, note.

12. *Knowledge of defect but not of the danger.* Where the conductor of a street car, who was injured by coming in contact with a barrier, knew, in a general way, that there were obstructions in the street through which the car passed, but did not know how near to the car nor how dangerous they were, and at the time of his injury was engaged in collecting fares, the question of negligence was for the jury. *Powers v. Boston* (Mass.), 46.

13. *Driving young horse near cars to test him.* Plaintiff having taken his horse, which was young, to a place near the cars, for the purpose of testing him, to see how he would act, was guilty of contributory negligence. *Cornell v. Detroit Electric R. Co.* (Mich.), 45, note.

## OF DIRECTORS.

14. What amounts to negligence in discharge of their duties. 653, note.  
See *BANKS*, 16, 22-25 · *CARRIERS*, 1-25; *MUNICIPAL CORPORATIONS*, 1-31, 25-30; *RAILROADS*, 1-32.

## OFFICERS.

See *DIRECTORS AND OFFICERS*.

## ORDINANCES.

See *MUNICIPAL CORPORATIONS*, 49, 51.

PLEADING AND PRACTICE.

1. *Physical examination of plaintiff in accident cases.* Courts have no power to compel one who sues for personal injuries to submit his person to examination in advance of the trial, at the instance of the adverse party. *McQuigan v. Delaware, L. & W. R. Co.* (N. Y.), 186.

2. Same subject in note. 190, note.

3. *Pleading.* Sufficiency of complaint in accident cases. 56, note.

4. *Suit against defendants as individuals — defense of incorporation — pleading.* In an action against the defendants as a joint-stock company, they denied that they were such a company, and claimed to be members of and stockholders in an incorporated company, by which the liability, if any, to plaintiff, was to be borne. Held, that such defense was available, although the fact of such incorporation was not pleaded, as the defense tended to show that there never was any liability on their part. *Demarest v. Flack et al.* (N. Y.), 264.

See BANKS, 82; INSURANCE, 62-67; MANDAMUS.

POLICE POWER.

1. Regulating charges — business affected with a public interest. 637, note.

2. Compelling abutting owner to clean or repair sidewalk. 679, note.

See CHARGES, REGULATION OF; CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS, 31-40.

PROMOTERS.

1. Contracts of. See 747, note.

PUBLIC USE.

See IRRIGATION; EMINENT DOMAIN, 5, 6.

QUO WARRANTO.

See FORFEITURE, 7.

RAILROADS.

ACCIDENTS AT CROSSINGS.

1. *Failure to look and listen — absence of flagman — contributory negligence.* In an action against a railroad company to recover damages for the alleged negligent killing of plaintiff's intestate, it appeared that decedent was a street-car driver, and that in coming toward defendant's track he slowed his car to a walk when he was within about twenty five or thirty feet of the railroad crossing and that he could have seen the approaching train seventy-five feet down the track when twenty-five feet away from the crossing, or could have seen the train one hundred and sixty feet down the track when within sixteen feet of the crossing; that deceased did not stop his car, but seemed to be looking at his horse with his hand on the brake; that there was a flagman regularly stationed at the crossing, but that he was in the flag-house, and gave no warning of danger. Held, that it was a question for the jury to determine whether the absence of the flagman from his post of duty warranted deceased in presuming that it was safe to cross defendant's track at the time, and a finding that deceased was not guilty of contributory negligence would not be disturbed. *Richmond v. Chicago & W. M. Ry. Co.* (Mich.), 22.

2. *Whether traveler may rely upon flagman at crossing.* Where a flagman

RAILROADS — ACCIDENTS AT CROSSINGS. — *Continued.*

is stationed at a crossing to give warning of approaching trains, travelers have a right to rely on his reasonable performance of his duty, and need not look and listen for a train before crossing the track. *Chicago, etc., R. Co. v. Clough* (Ill.), 36, note.

3. Where the gates at a crossing are not lowered, and no bell or whistle is sounded by a train approaching at an unlawful rate of speed, the mere fact that the flagman signaled plaintiff not to cross does not free the railroad company from culpable negligence unless such signal was given in time for plaintiff, by the exercise of reasonable care, to have avoided the injury. *Ibid.*

4. *Duty as to ringing bell and blowing whistle.* Although defendant was not required by statute to sound a whistle, if those in charge of the train saw plaintiff approaching, and about to go upon the track, and believed that he was unaware of the train's approach, they should have sounded the whistle, and taken every reasonable precaution to prevent the collision. *Piper v. Chicago, etc., R. Co. (Wis.)*, 36, note.

5. *Running switch — injury to child on crossing — liability.* Where the presence of a three-year-old child on a railroad track at a public street crossing is not attributable to the negligence of its parents, the railroad company is liable for injuries sustained by the child from being run over by a detached car while its employes were making a running switch without taking any precaution to avoid injuries to travelers on the crossing. *Louisville, etc., R. Co. v. Schmidt* (Ind.), 36, note.

6. *Backing train over crossing — negligence in giving signals — view obscured by passing train on first track.* In an action by the father against a railroad company for the negligent killing of his seven-year-old daughter it appeared that deceased, with other little children, was returning from school along the usual street, which was crossed by defendant's tracks; that they waited for a freight train on the north track to pass, after which deceased started to cross, and was run over by a train backing up at the rate of seven miles an hour on the south track. The latter train had been hidden by the first train and there was no signal given, except by the engine, which was at the other end, a distance of three hundred feet. Held, that the court properly refused to direct a verdict for defendant. *Louisville, etc., R. Co. v. Rush* (Ind.), 37, note.

7. *Omission to have head-light burning — liability.* The omission of a railroad company to have the head-light on its engine lighted at about dusk will not warrant a recovery for the death of one run over by the engine at a crossing, where the engine and cars, as well as the reflection of the lights from the car windows, were distinctly visible to persons near the crossing. *Daniels v. Staten Island Rapid Transit R. Co. (N. Y.)*, 37, note.

## ACCIDENTS TO EMPLOYEES.

8. *Derailment of car by accumulations of snow and ice.* Where a car is derailed by reason of the accumulation of snow, ice and dirt on the flanges of the rails, the railroad company is liable to an employe on the car, who sustained injuries by reason of the derailment, since the duty of keeping its track in proper repair rests on the master. *McClarney v. Chicago, M. & St. P. Ry. Co. (Wis.)*, 119.

9. The fact that the company permitted piles of snow to accumulate on the outside of the tracks, close to the rails where the accident happened, does not

RAILROADS — ACCIDENTS TO EMPLOYEES — *Continued.*

render the company liable for the injury, in the absence of evidence showing that such accumulations contributed in any way to the derailment of the car. *Ibid.*

10. *Engine derailed by obstruction on track caused by stranger.* The proof disclosing that plaintiff, while acting in the capacity of fireman on a railroad locomotive, was injured by a fall occasioned by the derailling of the engine, tender, etc., and that the accident was caused by the car-wheels coming in contact with a loose plank resting on one of the rails of railroad track, held, that the plaintiff, in order to recover of the master, must show that the accident was caused by the direct and immediate act of its servants; and in case the proof shows that the accident would not, in all likelihood, have happened, but for the interposition of some independent responsible third party between the servant's negligence and the injury sustained, and it affects the result, and is the immediate cause of the injury, the plaintiff cannot recover against the original wrong-doer. *Mire v. East Louisiana R. Co. (La.)*, 124, note.

11. *Derailement by reason of defective switch — brakes out of order.* Where plaintiff was injured by the derailling of his locomotive at a switch which was defective, in that the spring was not strong enough to throw the point of the switch against the rail, and keep it there, when the position of the lever indicated that this was the position of the switch, and that it was safe to pass it, an instruction that the injury was due to the negligence of fellow-servants in not placing the rails in a proper position by the usual means of a maul or axe, is properly refused. *Texas, etc., R. Co. v. Johnson (Tex.)*, 124, note.

12. *Unloading cars with a "plow" while on a curve — failure to provide suitable appliances.* A railroad employe was injured by the breaking of a cable used to draw a "plow" over flat cars loaded with gravel. The cars were at the time standing on a curve, and in that position the strain on the cable was greater than when the cars were on a straight track, and required additional appliances than those in use at the time in order to render its use entirely safe. There was no evidence that the cable was insufficient to operate on a straight track. Held, that the evidence justified a verdict that the accident was caused by the company's negligence in not providing suitable machinery. *Cincinnati, etc., R. Co. v. Koesch (Ind.)*, 124, note.

## ACCIDENTS FROM FRIGHT OF HORSES.

13. *By blowing off steam.* In an action against a railroad company for injuries caused by plaintiff's horse being frightened by defendant's locomotive blowing off steam, the evidence showed that the horse was frightened by the escaping steam; that no notice was given of the approaching train by ringing the bell, and that the view of the train was obstructed by box-cars, one of which was standing in the limits of the highway. Held, sufficient to sustain a verdict for plaintiff. *Presby v. Grand Trunk Ry. Co. (N. H.)*, 42.

14. *Use of automatic valve.* The fact that the escape of steam from defendant's locomotive was regulated by an automatic valve is no justification for allowing steam to escape, and it was a question of fact for the jury whether defendant was guilty of negligence in permitting steam to escape. *Ibid.*

15. *By blowing whistle.* Plaintiff, while on one of the streets of a village, was injured by a runaway team which had become frightened by the blowing of a whistle on one of the defendant's engines. It was held that whether it

RAILROADS — ACCIDENTS FROM FRIGHT OF HORSES — *Continued.*

was negligence to blow the whistle under the circumstances of the case was a question properly left to the jury, and a verdict for the plaintiff was affirmed. *Dugan v. St. Paul, etc., R. Co. (Minn.)*, 45, note.

16. *By noise of train overhead.* A railroad company is not liable for injuries resulting from the frightening of horses by the noise of its trains, where they are operated in a lawful manner, and without negligence or malice. *Ryan v. Pennsylvania R. Co. (Penn.)*, 45, note.

17. *Horses frightened by electric cars — negligence of company.* In an action against an electric railway company, it appeared that plaintiff, while driving along the avenue on which was the car line, saw a train coming around a bend about three hundred and fifty or four hundred feet away; that he motioned for it to stop, and got out, and took his horse by the head. The cars were then about half way to him, and slowing up; and the horse exhibiting signs of fear, he led it across the sidewalk into an open field. The horse dragged him about the field, and finally turned, and dragged him into the street, where he fell, and was injured, and the horse ran away. The cars were running at ordinary speed, the gong was sounded as they approached the bend, and they stopped before reaching plaintiff. Held, that there was no negligence on defendant's part, its servants not being obliged to immediately stop the cars. *Cornell v. Detroit Electric R. Co. (Mich.)*, 45, note.

18. *Team frightened by grip-car ringing bell at crossing — negligence.* Where a team of horses take fright at a traction-car, and run away, injuring their driver, the fact that the gripman stopped the car and rang the bell at a street crossing near the team does not constitute negligence, it being his duty to stop and ring at such crossings. *Steiner v. Philadelphia Traction Co. (Penn.)*, 45, note.

## TURN-TABLE ACCIDENTS.

19. A railroad company owning a turn-table situated on the company's land about six hundred feet from two highways, and having upright guy-bars, is not bound to keep it locked on the ground that it is an attractive object to children, and a child injured while playing thereon cannot recover. *Daniels v. New York & N. E. R. Co. (Mass.)*, 61.

20. The owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with any thing that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it, is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them, and what that degree of care requires him to do is ordinarily a question for a jury. *O'Malley v. St. Paul, etc., R. Co. (Minn.)*, 68, note.

21. While, in the case of its turn-tables and trucks standing on its tracks, by playing with which such children are injured, it is competent for a railroad company, in order to show that it exercised due care, to prove that it secured the turn-tables and trucks in the way customary with all railroad companies, such proof is not conclusive that due care was exercised. *Ibid.*

## FIRES.

22. *Setting fires — evidence of negligence — questions for jury.* In an action

RAILROADS — FIRES — *Continued.*

against a railroad company for damages by fire caused by sparks from a locomotive, the bare, uncontradicted evidence that the apparatus was in good order, and was properly managed, and that the engineer and fireman were competent and skillful, does not establish the fact that the fire did not thus originate, in the absence of proof that it could have originated in any other way. *Hagen v. Chicago, D. & C. G. T. J. R. Co. (Mich.)*, 68.

23. The fact that this fire, and another one in the field a short distance away, did occur immediately after the passage of the locomotive, when connected with evidence that the apparatus, when in good order and properly managed, could not throw sparks to the building, was so inconsistent with evidence given by the company that the apparatus was in good order, and properly managed, as to raise a question for the jury, although the company's evidence was not expressly contradicted. *Ibid.*

24. *Effect of plaintiff collecting insurance for the property destroyed.* The defendant is entitled to no reduction of damages by reason of the fact that plaintiff has collected insurance upon the property destroyed. *Following Perrott v. Shearer*, 17 Mich. 48. *Ibid.*

25. *Duty of company as to appliances.* A railroad company is bound to adopt and use only such appliances as, in the progress of science and improvement, have been shown by experience to be the best, and which are generally known. *Ibid.*

26. *High speed as evidence of negligence.* It is the duty of a railroad company to run its trains as near on time as possible, and for it to run a way freight at the rate of forty miles an hour, is not in itself negligence. *Ibid.*

27. *Fire escaping from right of way.* Where a railroad company, by its agents and employes, in burning off its right of way, negligently allows the fire to escape upon the premises of the adjacent land-owner, where it consumes the property of the latter, the injury thus inflicted falls fairly within the scope of the statute as the result of a fire caused by the operation of said railroad. *Missouri Pac. R. Co. v. Cady (Kans.)*, 77, note.

28. The act of a railroad company in starting a fire on a bed of peat, upon which its track was laid, at a season of great drought, is a positive wrong, which renders it liable for injury to adjacent property, and the fact that plaintiff's land was not the first to be reached by the fire will not prevent a recovery. *Louisville, etc., R. Co. v. Nitsche (Ind.)*, 77, note.

29. After a fire started on defendant's right of way, by its negligence, had been apparently extinguished, a wind arose and the next day a fire in that vicinity spread to plaintiff's land and damaged his property. Held, that the question whether defendant's negligence was the proximate cause of plaintiff's loss should be left to the jury. *Haverly v. State Line, etc., R. Co. (Penn.)*, 77, note.

30. *Burning fence — escape of stock — liability of company.* A railroad company which has negligently burnt a pasture fence is not relieved from liability for the loss of horses that escaped in consequence thereof by the fact that such horses had been driven from a remote part of the state a few days before, and that the company had no notice of their character, as it could reasonably have anticipated that the owner of the pasture would put therein stock that would

RAILROADS—FIRES—*Continued.*

be liable to stray off but for the fence. *St. Louis, etc., R. Co. v. McKinsey (Tex.)*, 77, note.

81. *Destruction of growing timber and trees—measure of damages* Where fire is negligently allowed to escape from the right of way, upon adjacent premises, and it burns and injures a natural growth of young timber and trees, the measure of damages is the amount of the damage the trees and timber suffered by reason of the fire, and not the difference in the value of the land with the standing trees and timber before the fires and afterward, nor the market-price of the trees for transplantation as shade or ornamental trees. *Fremont, etc., R. Co. v. Crum (Neb.)*, 77, note.

82. *Contributory negligence.* If the plaintiff was in a position to have prevented any damage from fire to his property without incurring unusual danger, and made no effort to do so, it was negligence on his part, and precludes his right of recovery. *Eaton v. Oregon R. & Nav. Co. (Ore.)*, 77, note.

## HACK PRIVILEGES AT STATION.

83. *Right to grant and enforce exclusive privilege of standing hacks at depot platform.* A railroad company cannot, by granting to one person the exclusive privilege of standing hacks at the platform of its depot, prevent other persons from bringing their hacks into the depot grounds, and soliciting for the carriage of passengers from the depot, so long as they do not interfere with the company's business. *McConnell v. Pedigo et al. (Ky.)*, 711

83. Same question treated in note. 715, note.

## DUTY AS TO MAINTAINING STATION.

84. *When company will not be compelled to maintain a particular station.* Defendant railroad company, having a discretion as to the location of the route of its road, constructed its road through Y., an established county-seat, and the largest and most prosperous town in the county and along the line of the road for many miles, and stopped its trains there, but did not build a station. After completing its road four miles further, to North Y., a town laid out on unimproved lands of its own, it there erected a station, and ceased to stop its train at Y., which resulted in a rapid increase in size of North Y. at the expense of Y., which as rapidly dwindled. On an application for a *mandamus* to compel defendant to erect and maintain a station at Y., and stop its trains there, it appeared that North Y. had become by far the most important town in the county, and that the surrounding community were better accommodated by a station at that place; that a station at Y. would not pay expenses; that there were other stations on the road furnishing sufficient facilities for the country south of North Y.; and that North Y. had been made the county-seat by act of the legislature. Held, *mandamus* being predicated upon the facts existing at the time of rendering judgment, that it was erroneously issued, the facts not bringing the case within the power of the court to grant relief. *Northern Pac. R. Co. v. Territory of Washington (U. S.)*, 858.

## DISCRIMINATION; GRANTING EXCLUSIVE PRIVILEGES.

85. The question considered with reference to hack and expressmen. 715, note.

## RAILROADS IN STREETS.

86. *Elevated railroad—right of lessor to recover damages.* The owner of a city lot, which he has leased after the construction of an elevated road in the

RAILROADS — RAILROADS IN STREETS — *Continued.*

street in front of the lot, can maintain an action for damages for the impairment of his easement in the street by the existence and maintenance of the road during the time the lot was in the actual possession of his lessee, where the road has been built without condemning his easement in the street. *Kernochan et al. v. New York El. R. Co. et al.* (N. Y.), 407.

37. *Damages accruing after death of owner.* Upon the death of such owner intestate, the right of action for damages, accruing after his death, vests in his heirs, instead of his administrator. *Ibid.*

38. *Rights of remaindermen to damages while possession in life tenant.* The construction and operation in a street of an elevated railway being an injury to the inheritance of the abutting property, an action for damages caused thereby, and to enjoin its further use, may be maintained by the remaindermen of the premises obstructed. *Thompson v. Manhattan Ry. Co.* (N. Y.), 416, note.

39. *Prescriptive right to occupy street.* Twenty years' adverse possession of part of the air, light and access appurtenant to a city lot by means of the maintenance of an elevated road in the street in front of such lot is sufficient to give title to such easements by prescription, even though the possession is based on no actual adverse title. *Broilestedt v. Railroad Co.*, 55 N. Y. 220, distinguished. *American Bank-Note Co. v. New York El. R. Co. et al.* (N. Y.), 583.

40. The possession of a street by an elevated railroad company under a charter which provides that any private property used or acquired shall be compensated for by the company is not necessarily subordinate to the street rights of the owners of abutting property. *Ibid.*

41. *When occupation by railroad not adverse to rights of abutting owners.* In an action against an elevated railroad company for injury to a lot abutting on the street on which the road runs, the company pleaded title by prescription. The evidence showed that the original entry upon the street was merely experimental; that during the twenty years' possession relied on to establish the title the road had been changed from a cable road to a steam railroad; that the original possession was taken when both parties were ignorant that the maintenance of the road interfered with the rights of the owners of abutting property; and that, after the expiration of said twenty years, the company instituted proceedings to condemn the lot-owner's street rights. Held, that the evidence justified a finding that the company's possession was not adverse to the lot-owner. *Ibid.*

42. *Change of cable to elevated road — effect upon amount of recovery.* Where some part of the street rights of a lot owner have been taken by an elevated road operated by a cable, and afterward the cable company's successor changes the road into one operated by steam, and increases the amount of interference with the lot-owner's street rights, the lot-owner's acquiescence in the operation of the cable road, even though it has continued for twenty years, does not diminish the damages which he may recover from the steam road for its interference with his street rights. *Ibid.*

43. *Damage as an alternative to injunctive relief — measure of.* In an action by a lot-owner to restrain the operation of an elevated road where the court grants in the alternative either an injunction or the payment of damages by



RAILROADS — RAILROADS IN STREETS — *Continued.*

the company, such damages should not exceed the compensation to which the lot-owner would be entitled were the proceeding one for the condemnation of his street right. *Ibid.*

44. *Noise as an element of permanent damages.* In such case, damages for injury resulting from the noise of passing trains should not be allowed, since such damages are only recoverable where the injury from noise was caused while the road was maintained without right. *Ibid.*

45. Noise and vibration as elements of damage. 597, note.

46. Loss of privacy as an element of damage. 599, note.

47. *Rights of purchaser of abutting property after road in operation.* At the time plaintiff purchased certain premises the easements appurtenant thereto, of light, air and access in and over the street, were being trespassed on by defendant by the maintenance and operation of an elevated railroad in the street, it never having exercised its right to condemn the easements. Held, that plaintiff, without regard to the price paid by him for the property, had a right of action for a continuance of the trespass, and a right to compensation for the permanent injury to his property. *Pappenheim v. Metropolitan El. Ry. Co.* (N. Y.), 378.

48. *Rights of executors and trustees of deceased owner.* The executors and trustees of a deceased abutting owner do not occupy the relation of purchasers, but succeed, in behalf of the beneficiaries, to the rights of the abutter, and may recover for damages to the rental value of the land, caused by the operation of such railroad, *Mortimer v. Manhattan R. Co.* (N. Y.), 391, note.

49. *Measure of damages for taking or interfering with easements of light, air and access.* The easements of light, air and access which an abutting owner has in a street have no value apart from the abutting property; and where they are taken by the construction and maintenance of an elevated road in the street their value is to be measured by the injury which such taking inflicts on the abutting property, and with reference to the agency by which they are taken; and where it appears that the construction and operation of the road has benefited the abutting property, and increased its value, which would not have been so great except for the building of the road, or where it appears that the road has not prevented the natural increase in value, the abutting owner has received no damage, and there can be no recovery. The act that the increase is common to all the property in the street, and greater in proportion to property on the side streets than that on the street in which the road is constructed, is not material. *Bohm v. Metropolitan El. R. Co.* (N. Y.), 416.

52. *Elements of damage.* Diminishing the natural increase in value. 431, note.

53. Damages to entire lot extending from street to street. 433, note.

54. The question of benefits. 434, note.

55. Damages may be awarded for diminution in the rental value of the property due to defendant's obstruction of the street while it was constructing its road. *Williams v. Brooklyn El. R. Co.* (N. Y.), 434, note.

56. *Evidence.* It is error to permit a witness to testify as to what, in his opinion, "is the best use to which the property could have been put if it had not been for the elevated railroad and this interference." *Gray v. Manhattan Ry. Co.* (N. Y.), 434, note.

RAILROADS — RAILROADS IN STREETS — *Continued.*

57. Evidence as to the effect of the railroad on other property in the same street is admissible. *Doyle v. Manhattan Ry. Co.* (N. Y.), 484, note.

58. Where part of plaintiff's property is used for business purposes, evidence as to the effect of the railroad on the business of the street is admissible for the purpose of showing that plaintiff's property was benefited by the construction and operation of the road. *Ibid.*

59. Opinion evidence. 485, note.

60. *Question of interference with rights of abutting owners not for jury to determine.* The erection of an elevated railroad in a city street, without the consent of the abutting owners, and though the fee of the street is in the municipality, is, in itself and as matter of law, an interference with such owners' rights, and the question of such interference is not one to be left to the jury for determination. *Williams v. Brooklyn El. R. Co.* (N. Y.), 436, note.

61. *Remedy in equity, when barred by statute of limitations.* Code of Civil Procedure of New York, section 388, providing that an action, the limitation of which is not therein specially prescribed, must be commenced within ten years after the cause of action accrues, does not apply to an equity action to restrain continuous trespasses on land resulting from an elevated railway in the street on which it abuts, and such an action, therefore, is not barred in ten years from the original trespass, but may be maintained so long as the plaintiff has title to the property injured, and a cause of action for such injuries is not barred at law. *Galway v. Metropolitan El. Ry. Co. et. al.* (N. Y.), 391.

62. *Laches — effect of eleven years' delay.* Plaintiff sued to restrain the further operation of an elevated street railway which had been built eleven years before without the consent of abutting owners. Plaintiff had seen the railway in course of construction at that time, and had subscribed money for the employment of counsel to prevent it, but had made no other protest, nor instituted any legal proceedings. His opposition, however, had been persistent, as had that also of the other owners, and their claim had always been that defendants had no right to build in the street without compensating them for damages. Held, that the plaintiff's conduct was not such as to estop him; and that the mere fact of his delay in bringing suit was no defense, so long as his rights to the property were not barred by adverse possession. *Ibid.*

63. When remedy of abutting owner barred. 406, note.

64. *Steam railroads.* Embankments and structures in street for railroad purposes. Rights of abutting owners. *Reining v. New York, etc., R. Co.* (N. Y.), 476.

65. Railroad embankment in street not a change of grade and abutting owner entitled to damages therefor. *Ibid.*

66. Statute authorizing city to permit railroads in street, implied conditions. *Ibid.*

67. Right of abutting owner to damages when constitution provides for compensation for property taken only. 488, note.

68. Same, when constitution provides for compensation for property taken or damaged. 489, note.

69. *Right to damages when railroad wholly on further half of street.* The building of a railway track along a street, more than ten feet east of the center line, is not an appropriation of property abutting on the west side thereof,

RAILROADS — RAILROADS IN STREETS — *Continued.*

for which damages can be recovered. *Trustees of First Cong. Church v. Milwaukee, etc., R. Co. (Wis.), 489, note.*

70. *Gates and barriers at crossing — whether owner of fee entitled to compensation.* Where gates and barriers for the protection of the public are built and maintained in the street upon plaintiff's lot, by a railway company, in compliance with an order of the common council, the company is not liable in damages for a taking of the property. *Trustees of First Cong. Church v. Milwaukee, etc., R. Co. (Wis.), 489, note.*

71. *Whether additional track in street gives right to further compensation.* A railroad company, which has located a single track along a city street under an ordinance granting it the right to construct its railroad along the street within certain limits, and under general proceedings of appropriation, in which damages were assessed to adjacent land-owners, is not restricted to one track, but has the right to construct additional tracks if required by its business, if there is sufficient room to do so within the prescribed limits, without paying additional damages. *Chicago, etc., R. Co. v. Eisert (Ind.), 489, note.*

72. *Meaning of the words "line of the railroad" in ordinance fixing limits of location in street.* An ordinance granting a railroad company the right to build its road in a street provided that the company should grade the street and that "the line of the railroad shall be located so as not to approach the sidewalk curb-stone nearer than fifteen feet." Held, that the words, "line of the railroad," did not mean the extreme limit, including ties and grade, or the center or thread of the track; but referred to the rails, they being the only part of the road raised above the grade of the street. *Chicago, etc., R. Co. v. Eisert (Ind.), 490, note.*

73. *Damages for decrease of rents where market value increased.* In an action by the owner of the abutting property against the company for damage to the freehold and for diminishing the annual value of the premises for use, there can be no recovery as to the freehold where the market value has been increased, but as to the latter there may be a recovery, notwithstanding such increase in the market value. A wrong-doer cannot set off increase of market value, caused by his wrongful act, against loss of rents and profits occasioned thereby. *Davis v. East Tenn., etc., R. Co. (Tenn.), 490, note.*

74. *Judgment as to one lot bars suit as to another lot by the same plaintiff.* A railway having been constructed along a street on which plaintiff owned two lots, a few hundred feet apart, he obtained judgment for damages to one of them arising from the construction and operation of the road. Held, that this was a bar to a suit for damages to the other lot, accruing prior to the filing of the complaint in the first suit, from the same cause. *Beronio v. Southern Pac. R. Co. (Cal.), 490, note.*

See CONSTITUTIONAL LAW; EMINENT DOMAIN, 10; MANDAMUS.

## RIPARIAN RIGHTS.

1. *Establishment of dock-lines by municipal corporations — necessity of notice.* A city cannot by ordinance, under authority of the legislature, fix an arbitrary dock-line in a navigable river, in the bed of which the riparian owners have absolute property, subject only to the public right of navigation, without notice to such owners. *City of Grand Rapids v. Powers (Mich.), 490.*

RIPARIAN RIGHTS — *Continued.*

2. *Dock-lines encroaching upon private property.* The fixing of such line so as to pass across the natural bank of the river at certain points, is unconstitutional, as taking private property for public use without compensation. *Ibid.*

3. *Rights of riparian owners when stream not navigable.* At a point in such river occupied by rapids, and thereby entirely unfitted for navigation proper, and where the center of the stream only is useful for floating logs, a dock-line cannot be fixed so as to prevent the riparian owner building out to the center of the stream such structures as do not interfere with the public uses of the stream or with the rights of other riparian owners. *Ibid.*

## STOCK AND STOCKHOLDERS.

## STATUTORY LIABILITY.

1. *Liability for failure to file certificate — increase stock.* — The general manufacturing act (Laws of New York, 1848), making the individual stockholders of a company liable for a failure of the company to file a certificate showing that its capital stock has been paid up in full, is in derogation of the common law, and must be construed strictly. So, where it appears that such certificate of the original issue of stock has been filed, and that there was a subsequent issue of increased stock, no liability for want of a certificate with respect to such increase can attach to a member of the company until it is proved that he is holder of a part of the increased stock. *Griffith v. Green et al.* (N. Y.), 436.

2. *Statute making stockholders liable to creditors until capital paid in and certificate filed is not for benefit of directors.* Under Laws New York 1848, chapter 40, section 10 (general manufacturing act), which provides that all stockholders of the corporations named in the act shall be liable to creditors thereof until the entire capital stock shall have been paid in and certificate thereof filed, the word "creditors" does not include directors to whom the corporation is indebted for salaries. *McDowall v. Sheehan* (N. Y.), 210.

3. *Double liability clause of Minnesota constitution construed.* Article 10, section 3, of the constitution of Minnesota, providing that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him," is self-executing, and creates an individual liability on the part of the stockholder for corporate debts to an amount equal to the amount of stock held or owned by him in addition to his liability upon his contract of subscription. *Willis v. St. Paul Sanitation Co.* et al. (Minn.), 599.

4. *Release of corporation under insolvent law — effect upon stockholder's liability.* The provisions in section 1 of chapter 30, Laws 1889, amending the insolvent law of 1881, "that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor or otherwise for the same debt," includes stockholders who are liable for the debts of the corporation. *Ibid.*

5. *Liability — actions in foreign state.* Although the laws of Kansas provide that if a judgment creditor of certain corporations is unable to find property whereon to levy execution, he may proceed by action to charge the stockholders with the amount of his judgment, a resident of New York holding an

STOCK AND STOCKHOLDERS—STATUTORY LIABILITY—*Continued.*

unsatisfied judgment against a Kansas corporation, which has no place of business in Massachusetts, cannot maintain an action in the latter state against a resident of California, to establish his personal liability as a stockholder in such corporation, where no proceedings have been taken in Kansas to establish such personal liability. *Bank of North America v. Rindge* (Mass.), 1.

## SUBSCRIPTIONS.

6. *Waiver of implied condition that whole stock must be subscribed.* Though only part of the defendant's capital stock had been subscribed, and there was nothing to rebut the implied legal condition that no stock payments should be enforced until all the stock was subscribed, yet, where subscribers to stock expressly agreed, for the purpose of enabling defendants to build a certain part of its road, to pay their subscriptions, and on the strength of the agreement such part was constructed, this was a waiver of such implied condition, and made them liable on such subscriptions. *Anderson v. Middle & E. Tenn. R. Co.* (Tenn.), 845.

7. *If such condition not waived no action can be maintained on subscription.* Subscribers who did not sign such agreement, nor vote to have part of the road constructed, cannot be held on their subscriptions, where only part of the stock has been subscribed. *Ibid.*

8. *Fraud in procuring subscriptions.* Though defendant's agents represented at the time such subscriptions were made that no calls for stock would be made until another road was built to N., and arrangements made whereby defendant's trains could be run to N. over such road, yet this would not defeat a subsequent special agreement to pay subscriptions as work on part of the road progressed. *Ibid.*

9. *Preliminary agreement to take stock. Liability.* Defendants signed a subscription paper reciting that "we, the undersigned citizens of S., promise to pay the trustees of the hotel to be built at S., the sums set opposite our names, to be taken as stock, \$25 per share." It was represented to them by the citizens' committee, soliciting subscriptions that the hotel would cost \$150,000, and that this paper was informal, and was merely "to see what could be done," and that a binding subscription paper would be presented later. When this was presented, defendants refused to sign. Afterward a corporation was formed, and an hotel built, costing about \$110,000, and stock to the amount subscribed was tendered, but refused by defendants. Held, that they were not liable to the corporation for the sum thus subscribed. *Plank's Tavern Co. v. Burkhard et al.* (Mich.), 57.

10. *Action on note given for stock subscribed—estoppel to deny corporate existence.* Where a number of persons are associated together and are acting as a corporation under color of lawful authority as such, though their corporate organization is legally defective, a subscriber to the corporate stock, who was a promoter of the corporate organization, and who has been a party to and has acquiesced in the subsequent proceedings in incurring liabilities and issuing the stock, is also estopped to deny that the association is a corporation *de facto*, or that the stock so issued is valid in an action on a note given for the amount of his subscription. *Minnesota Gas-light Economizer Co. v. Denslow* (Minn.), 352, note.

11. *Fraud in procuring subscription.* In an action by a railroad company on

STOCK AND STOCKHOLDERS — SUBSCRIPTIONS — *Continued.*

a note given for a subscription to its capital stock, a good defense is set up by a plea that plaintiff's agents procured the subscriptions by representations that plaintiff would issue stock only to the amount of \$3,000 per mile, and bonds only to the amount of \$12,000 per mile, whereas at the time the representations were made, stock had already been issued, or agreed to be issued, to the amount of \$12,000, and bonds to the amount of \$15,000 per mile. *Weems v. Georgia M. & G. R. Co. (Ga.)*, 352, note.

12. Where a subscription for corporate stock is obtained by the representation that a prominent business man has subscribed for a large amount, and the fact that he paid nothing for his stock is concealed, such concealment makes the representation fraudulent, and is sufficient to avoid the contract. *Coles v. Kennedy (Iowa)*, 352, note.

13. But representations as to the future intention, purpose or expectation of the corporation, or the prospective value of its assets, though false or not made in good faith, will not constitute such fraud as will enable the subscriber to avoid his contract. *Armstrong v. Karshner (Ohio)*, 353, note.

14. *Cancellation of subscription for fraud.* Where persons are induced to subscribe to the stock of a corporation by representations that it had a paid-up capital of a certain amount, was out of debt, and doing a profitable business, and that they would be given employment therein at specified wages, all of which representations are false, they are entitled to a decree for the cancellation of their subscription, and the return to them of the money they paid for the stock, with interest. *Sherman v. American Stove Co. (Mich.)*, 353, note.

UNPAID SUBSCRIPTIONS — LIABILITY TO CREDITORS.

15. *The "trust fund" doctrine examined and criticised.* The so-called "trust fund" doctrine that "the capital of a corporation is a trust fund for the payment of its debts" considered and criticised. *Hoespe v. Northwestern Mfg. & Car Co. (Minn.)*, 562.

16. The capital of a corporation is its own property, which it may use and dispose of (if not prohibited by its charter), the same as a natural person. It is not held in trust for creditors, except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of corporate debts, and that, as in the case of a natural person, any disposition of it in fraud of creditors is void; and in this respect there is no distinction between unpaid capital and paid capital, between "stock subscriptions" and any other assets of the corporation. *Ibid.*

17. *"Bonus" stock—liability of holder rests upon fraud.* The right of creditors to compel the holders of "bonus" stock to pay for it contrary to their actual agreement with the corporation rests neither on implied contract nor upon any "trust fund" doctrine, but upon the ground of fraud. *Ibid.*

18. The fraud, in such case, consists in the misrepresentation as to the actual amount of capital, upon the faith of which persons have dealt with the corporation and given it credit. *Ibid.*

19. *What creditors may enforce the liability — prior and subsequent creditors.* Hence it is only those creditors who have relied on, or who can fairly be presumed to have relied on, the stock representing actual capital, in whose favor equity will enforce payment of such stock. Consequently payment can never

STOCK AND STOCKHOLDERS — SUBSCRIPTIONS — *Continued.*

be enforced in favor of one who became a creditor before the "bonus" stock was issued. *Ibid.*

20. It is not necessary that a "subsequent" creditor should have alleged that when he dealt with the corporation he believed that the stock had been paid for, and that he gave credit on the faith of it. If in fact the creditor had knowledge of the arrangement by which the "bonus" stock was issued, that is a matter of defense to be set up by the defendant stockholder. *Ibid.*

21. *Right of assignee of corporate creditor to enforce such liability.* Where a creditor asks for such relief against a stockholder he should show his own equities entitling him to such relief. Hence, when it appears that he is not the original creditor, but had purchased the claims after the corporation had become insolvent, and its affairs had been placed in the hands of a receiver, he should state what he paid for the claims, or at least show that he paid a substantial consideration for them. Equity will not grant such relief for the benefit of those who have bought up claims against an insolvent corporation for a nominal consideration for the purpose of speculating on the liability of stockholders. *Ibid.*

22. *When action accrues against holder of bonus stock.* The right of action in favor of creditors against the holders of such bonus stock does not accrue until the corporation becomes insolvent. *Ibid.*

## STREETS AND HIGHWAYS.

1. *Vacating street — power of courts to review action of municipal authorities.* Where the charter of a city confers power to vacate streets, its action, in any particular case, cannot, in the absence of fraud, be reviewed by the courts. *Glasgow et al. v. City of St. Louis et al. (Mo.), 192.*

2. *Power of city not dependent upon manner in which street acquired.* Where a city has the power to vacate streets it makes no difference, in the exercise of that power, whether the public acquired the street to be vacated by condemnation or by dedication. *Ibid.*

3. *Right of abutting owner to damages.* A cause of action for the recovery of damages is not stated against a municipal corporation by the plaintiff — an abutting lot-owner — in a complaint in which the only act complained of is the passage by the city council, and the subsequent approval by the mayor, without the consent of the plaintiff, and without any compensation whatsoever to him, of a resolution or ordinance declaring a part of a public way abandoned and vacated. *Hielscher v. City of Minneapolis (Minn.), 115.*

4. Subject treated in note. 117, note.

5. *Action by one whose property does not abut on the vacated portion.* An injunction will not lie to restrain the enforcement of a city ordinance vacating a street on which none of plaintiffs' property abuts, and plaintiffs merely suffer an inconvenience in common with all other persons. *Glasgow v. St. Louis (Mo.), 192.*

6. *The injury to such property not a damage within the constitution.* In such case plaintiffs' property is not damaged within the meaning of the constitution of Missouri, article 2, section 21, declaring that "private property shall not be \* \* \* damaged for public use without just compensation," since no injury peculiar to them is shown. *Ibid.*

7. *Vacation of street and occupation of same by a railroad — rights of abutting owner.* The city authorities of Rochester vacated the street in front of plain-

STREETS AND HIGHWAYS — *Continued.*

tiff's premises and the same was occupied by the defendant company, which erected at that point a stone abutment and earth embankment about fourteen feet high, upon which its road was built and operated pursuant to statutory authority. The space between the embankment and the plaintiff's lot was too narrow to admit of the approach of teams and there was no other access to the plaintiff's premises. Held, that the plaintiff had a right of access to her premises over the street, which was property and of which she could not be deprived without compensation; that the interference with such right of access by the vacation of the street and construction of the embankment, was a taking of the plaintiff's property, within the meaning of the constitution, and that she could maintain a suit for damages against the defendant, for its unlawful interference with such right of access. *Egerer v. New York Cent. & H. R. R. R. Co.* (N. Y.), 221.

See MUNICIPAL CORPORATIONS, 1-21; NEGLIGENCE.

## TAXATION.

1. *Corporate taxation — words "capital stock" construed.* Under the act of 1857 (Laws N. Y. 1857, chap. 456, § 8), providing that "the capital stock of every company liable to taxation, \* \* \* together with its surplus profits or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, \* \* \* shall be assessed at its actual value, and taxed in the same manner as the other real estate and personal estate in the county," it is the capital of the company that must be valued and assessed, and not the share stock held by the corporators. *People, ex rel. Union Trust Co., v. Coleman* (N. Y.), 256, note.

2. *Mode of assessing the capital stock under New York statute.* It is only when the value of the capital stock is unknown to the assessors that they may consider the value of the shares as indicative of that of the capital; and where the amount and value of the capital are disclosed, and the assessors have no reason to disbelieve the statement, they cannot assess the capital stock at a valuation derived from the market value of the shares. *Ibid.*

8. *Shares of stock when not assessable under Indiana statute.* Revised Statutes Indiana, 1881, sections 6305, 6306, which provide that the property of a corporation shall not be assessed at a greater rate than that of an individual, and that, "where the tangible property or the capital stock of an incorporated company is listed and assessed, the shares of capital stock of such incorporated company shall not be listed and assessed," clearly prohibits the assessment of the capital stock where the entire capital is invested in tangible property which is duly listed and returned for taxation. *Hyland, Auditor, v. Brasil Block Coal Co.* (Ind.), 256, note.

See BANKS, 36, 43.

## TRUSTS.

1. *Trust combinations against public policy and void.* An agreement by which all, or a majority, of the stockholders of a corporation transfer their stock to certain trustees, in consideration of the agreement of the stockholders of other companies and of the members of limited partnerships, engaged in the same business, to do likewise; and by which all are to receive, in lieu of their stocks and interests so transferred, trust certificates to be issued by the trustees, equal at par to the par value of their stocks and interests; and by



TRUSTS—*Continued.*

which the trustees are empowered, as apparent owners of the stock, to elect directors of the several companies, and thereby control their affairs in the interests of the trusts so created; and are to receive all dividends made by the several companies and limited partnerships, from which, as a common fund, dividends are to be made by the trustees to the holders of the trust certificates — tends to the creation of a monopoly, to control production as well as prices, and is against public policy. *State v. Standard Oil Co. (Ohio)*, 879.

## ULTRA VIRES.

See BANKS, 85.

## WATER COMPANIES.

1. *Duty to supply water for private consumption.* A company incorporated for the purpose of supplying a city and its inhabitants with water, and by ordinance granted the privilege of laying its pipes through the streets for the purpose of conducting water, with no conditions imposed except that its pipes shall be laid in a certain manner, and that it should in no case charge more than a certain amount for water, must furnish water to any person on a street along which it has a pipe, though that pipe was laid for certain persons, who paid therefor on the agreement that, if it was used for supplying water to any one else, it should be paid for by the company. *Haugen v. Albina Light and Water Co. (Or.)*, 464.

2. *Mandamus the proper remedy.* Mandamus is the proper method of compelling the company to furnish water. *Ibid.*

3. *Insufficient supply of water — liability for fires.* A contract on the part of a water company with a municipal corporation to supply the "city and the inhabitants thereof with water for public and private uses, for public and private consumption, and for putting out fires," establishes no contract relations between the company and private persons, and creates no liability on the part of the company to respond in damages for losses caused by its failure to supply a sufficient quantity of water for the extinction of fires. *Britton v. Green Bay and Ft. H. Water-Works Co. (Wis.)*, 444.

4. The fact that such provisions of the contract formed a part of an ordinance of the city could not create any such liability on the part of the company to private persons, the company being bound only by the obligations of the contract which it had voluntarily assumed. *Ibid.*

5. Where a city contracts with a water company to furnish a supply of water for use in extinguishing fires, such supply to be paid for by a levy of taxes upon the tax-payers of the city, and by the terms of the city ordinance, which the water company accepts, the water company agreeing "that it will pay all damages that may accrue to any citizen of the city by reason of a failure on the part of the company to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence of the water company," there is no such privity of contract between a citizen or resident and the water company as will authorize him to maintain an action against it for the injury or destruction of his property by fire, caused by the failure of the water company to fulfill its contract. *Mott v. Cherryvale Water & Mfg. Co. (Kans.)*, 451, note.

6. *Grant of exclusive rights to.* 740, note.

7. *Time contracts with municipalities.* 740, note.

See CONTRACTS, 9, 10.









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